Supreme Court, U.S.
FILED

165 (1) 10-34 JUN 30 2010

No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES L. RYAN, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS
Petitioner,

VS.

FRED LAWRENCE ROBINSON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

1. Whether a state prisoner fairly presents his federal claim when he changes the legal theory of the federal claim he presented in state court?

2. Did the Ninth Circuit ignore this Court's precedent and create a new requirement that triers of fact in capital cases must give weight to any proffered mitigation?

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OPINION BELOW

The Ninth Circuit panel's opinion, *Robinson v. Schriro*, 595 F.3d 1086 (9th Cir. 2010), is reproduced at Pet. App. A. The United States District Court for the District of Arizona's opinions denying relief are reproduced at Pet. App. B and Pet. App. C. The Arizona Supreme Court's opinion on direct appeal, *State v. Robinson*, 796 P.2d 853 (Ariz. 1990), is reproduced at Pet. App. D.

STATEMENT OF JURISDICTION

The Ninth Circuit filed its decision on February 22, 2010. The court denied Petitioner's petition for rehearing en banc on April 1, 2010. Petitioner timely filed this petition for writ of certiorari within 90 days of that date. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

A. *Fair Presentation.*

The Ninth Circuit granted habeas relief based on a legal theory that was never advanced in state court. Robinson unsuccessfully argued in state court that the "cruel, heinous, or depraved" aggravator should be set aside based on an alleged lack of evidence that the victim actually suffered. In federal court, he raised an entirely different argument—that the actions of his co-defendants should not be attributed to him and were "unforeseeable" because Robinson was not present at the scene of the murder.

In 1987 Robinson had a long and stormy relationship with Susan Hill, his common-law wife, in which they had separated on numerous occasions because Robinson was verbally and physically abusive. Pet. App. D at 2. During their separations, Robinson had on three occasions tracked Susan down, threatened her, and forced her to return. Pet. App. D at 2–4. In February 1987, Robinson allowed Susan to visit her father and step-mother in Yuma, Arizona.

Pet. App. D at 3–4. While there, Susan informed Robinson that her step-mother, Sterleen, had obtained a peace bond against Robinson and stated he should not enter their property. Pet. App. D at 4.

On June 8, 1987, Robinson was seen with his co-defendants, Theodore Washington and Jimmy Lee Mathers, loading guns into the trunk of Robinson's vehicle. *Id.* Robinson informed his son that he was "going to Arizona to take care of some business." *Id.* He also told his son that he was going to Arizona to see if Susan was there. *Id.*

That night, two intruders entered Susan's parents home, forced them into their bedroom, made them lie face down on the floor, bound their hands and feet, and shot them. Pet. App. D at 5. Prior to the shooting, Sterleen was heard asking that her feet be covered. *Id.* She died as a result of her gunshot wounds. Pet. App. D at 6.

Responding to a 911 call, a sheriff's deputy saw Robinson's vehicle in the vicinity of the Hills' home. Pet. App. D at 5–6. Robinson fled when the officer activated his emergency lights. Pet. App. D at 6. Robinson was eventually apprehended and police found among other items an empty box of shotgun shells and a red bandana identified by the Hill's son as the one worn by one of the intruders. *Id.*

Robinson was sentenced to death after a Yuma County, Arizona, jury convicted him of first-degree murder, attempted first-degree murder, two counts of aggravated assault, first-degree burglary, and armed robbery.

On direct appeal to the Arizona Supreme Court, Robinson argued that the "cruel, heinous, and depraved" aggravating factor was arbitrarily applied

because there was no evidence that the victim actually suffered pain or mental distress. The Arizona Supreme Court addressed Robinson's argument regarding the cruelty factor in the context he had presented it and denied his claim. *Robinson*, 796 P.2d at 862–63.

In his habeas petition, however, Robinson changed the legal theory upon which he challenged the cruelty aggravating factor. Robinson argued that, because no evidence existed that he intended or should have reasonably foreseen that the victim would suffer, the state court's cruelty finding under the statutory aggravating factor was arbitrary, in violation of his rights under the Eighth and Fourteenth Amendments. (Pet. App. B.) The district court concluded that Robinson's claim was "substantially different" from the issue he raised on direct appeal in state court and found the claim procedurally defaulted because Robinson failed to fairly present his claim in state court. (Pet. App. B.)

The Ninth Circuit disagreed with the district court's disposition of this claim. The court of appeals characterized Robinson's argument in federal court as a more detailed elaboration of those made in state court. Pet. App. A at 26–29. The court found that Robinson was not required to present his arguments in the same detail to the state and federal court. *Id.* The court held that Robinson raised the constitutional issue by arguing in his opening brief that "'the imposition of the death penalty was in violation . . . the Constitution of the United States because the especially cruel, heinous, or depraved aggravating factor was applied in an arbitrary manner." *Id.*

The court of appeals also found that Robinson's citation to *Jeffers v. Ricketts*, 832 F.2d 476 (9th Cir.

1987, *rev'd sub nom. Lewis v. Jeffers*, 497 U.S.764 (1990)—a case that did not address a claim of foreseeability— placed the Arizona Supreme Court on notice of Robinson's claim.

In dissent, however, Judge Rawlinson found Robinson's citation to *Jeffers* unpersuasive and underscored his emphasis on the lack of evidence that the victim suffered—not on his later theory that there was a lack of evidence that he intended or reasonably foresaw that the victim would suffer. Pet. App. A at 59 (Rawlinson, J., dissenting). The dissent also found that Robinson's argument in state court that he was not in the residence when the murders took place did not exhaust his claim that the cruelty factor was arbitrarily applied:

> More importantly, Robinson's reference to the fact that he was not inside the residence was made in conjunction with his discussion of the heinous prong of the statutory aggravating factors, not as part of his challenge to application of the cruelty prong of the statutory aggravating factors. Fairly read, Robinson's brief to the Arizona Supreme Court simply did not raise the issue he now argues, i.e., whether the evidence adequately established that Robinson had the intent to inflict pain upon the victim, or reasonably foresaw that the victim would suffer pain.
>
> . . .
>
> Because the existence of facts supporting application of the cruelty prong of the statutory aggravating factors would be adequate to sustain the death sentence imposed, I would end my analysis of Robinson's sentencing challenge with that conclusion.

Pet. App. A at 59–60 (Rawlinson, J., dissenting).

B. *Ineffective Assistance of Counsel.*

In his state post-conviction proceeding, Robinson claimed that his trial counsel was ineffective for failing to investigate and present mitigation evidence. The state post-conviction court, the same Judge who sentenced Robinson to death, held a 2-day evidentiary hearing in which Robinson presented additional mitigating evidence including evidence of his impoverished background, episodes of childhood sexual abuse, potential for rehabilitation, and non-violent nature. In addition, Robinson presented expert psychological testimony that he suffered from low intelligence and borderline personality disorder. The State rebutted this evidence with expert opinion that Robinson suffered from anti-social personality disorder.

After hearing all of Robinson's after-the-fact mitigation, the state court determined that the evidence presented would not have affected the sentence imposed. The state court ruled:

> Mr. Robinson has been examined and found to have no mental [sic] evidence of mental disease per Dr. McCullars and an Axis II suggestion of Borderline Personality Disorder by Dr. Roy. Nothing in the record supports a suggestion that this defendant was unaware of the activities at the Hill home on the evening of the crime and the court now rejects, and would have at sentencing hearings, rejected a suggestion of Borderline Personality Disorder. This court accepts as true that Mr. Robinson has an antisocial personality disorder and is poorly adjusted to living in society, but there is nothing in his makeup now, nor in the opinion

> of the experts was there anything at the time of the offenses, which lessened his ability to differentiate right from wrong or to conform his actions with the law . . . .

See Pet. App. A at 66 (Rawlinson, J., dissenting).

The state court found that Robinson's additional mitigation evidence, particularly evidence of Robinson's childhood, had no connection to his actions years later at the time of the murder, and thus were not mitigating.

The district court concluded that there was no reasonable probability that the additional evidence Robinson presented in his state post-conviction proceeding would have changed the outcome. Pet. App. C at 44-45. While recognizing that Robinson's additional mitigation was not insignificant, the district court concurred with the state court that there was no evidence that Robinson suffered any mental impairment at the time of the murder. (*Id.*, Pet. App. C at 47. Likewise, the court found that Robinson's low intelligence, childhood sexual abuse, and impoverished childhood had no connection to his actions at the time of the crime and would have been accorded little mitigating weight. *Id.*

The Ninth Circuit, however, found that defense counsel should have discovered and presented "classic mitigation evidence" including "Robinson's impoverished background; his unstable and often abusive upbringing; his multiple episodes of childhood sexual abuse; his low intelligence; his personality disorder; his non-violent nature; and his potential for rehabilitation." Pet. App. A at 46–48. Notwithstanding the sentencing judge's post-conviction finding that the "new evidence would not have changed the sentencing decision, the panel

majority granted relief, holding that the state court and district court either "improperly rejected or under-weighted" the mitigation by employing a causal nexus test between the mitigation and the criminal act. Pet. App. A at 53. The majority concluded that its confidence in the state court's imposition of the death sentence was undermined because the state court should not have used the cruelty aggravating factor that the panel majority found had been arbitrarily applied. *Id.*

The dissent, citing this Court's recent decisions in *Bobby v. Van Hook*, 130 S. Ct. 13 (2009), and *Wong v. Belmontes*, 130 S. Ct. 383 (2009), found that those cases "clarify that these asserted failings cannot support a claim under *Strickland*." Pet. App. A at 62–63 (Rawlinson, J., dissenting). The dissent noted:

> Fortuitously, in this case, we do not have to try to determine whether the asserted deficiencies would have made a difference in the sentence imposed. In this case, we know the answer because the same judge who imposed the sentence of death presided over the postconviction review proceedings. After hearing all the mitigation evidence [Robinson] mustered after-the-fact, the sentencing judge declined to entertain the prospect of changing the previously imposed sentence.

Pet. App. A at 63–64.

REASONS FOR GRANTING THE PETITION

A. The panel decision squarely conflicts with this Court's "fair presentation" jurisprudence. This Court has held that 28 U.S.C. § 2254 requires a federal habeas petitioner to provide the state courts with a "fair opportunity" to apply controlling legal principles

to the facts bearing on his constitutional claim. In addition, a habeas petitioner must "fairly present" to the state courts the substance of his federal claim.

The decision of the court of appeals eviscerates the requirement that habeas petitioners fairly present their federal claims to the state court before requesting habeas relief. By allowing habeas petitioners to change the theory upon which they seek relief, the Ninth Circuit ignores well-established principles of comity and eliminates the requirement of 28 U.S.C. § 2254 that the state courts have the first opportunity to correct alleged error. Under the Ninth Circuit's reasoning, state courts will have to divine every possible theory associated with a federal claim in order to have an opportunity to pass upon the alleged error.

The Ninth Circuit ignored this Court's "fair presentation" jurisprudence by holding that Robinson's new legal theory regarding his claim that the cruel, heinous, and depraved aggravating factor was arbitrarily applied was exhausted. The decision below is in substantial tension with the decisions of this Court, which have explained that federal habeas petitioners must fairly present their legal claims to the state courts to allow those courts the first opportunity to correct any alleged error. The court of appeals' decision erases the exhaustion requirement in the habeas context. The decision below would allow a habeas petitioner to present one argument to the state courts, and once that argument is rejected, strategically shift to a new argument in his federal habeas petition without giving the state courts an opportunity to address the claim. This Court's review is thus warranted.

The Ninth Circuit's failure to apply this Court's fair presentation jurisprudence also infected its

analysis of Robinson's ineffective assistance of counsel claim. A reviewing court may only reverse if there is a reasonable probability that, but for trial counsel's unprofessional errors, the result of the proceeding would have been different. The court of appeals rejected the state court's finding that Robinson was not prejudiced under *Strickland* based on its view that the state court improperly considered the cruelty aggravating factor as part of the analysis or whether counsel's alleged ineffectiveness would have changed the sentencing decision.

B. The court of appeals' analysis of the prejudice prong of the *Strickland* analysis directly conflicts with this Court's ruling in *Harris v. Alabama*, 513 U.S. 504, 515 (1995). After erroneously concluding that the state court improperly considered the cruelty aggravating factor, the majority went on to find that the state court and district court improperly "under-weighted" the additional mitigation Robinson presented, thus creating a new requirement that sentencers in capital cases must give particular weight to any proffered mitigation in the sentencing calculus. This new requirement is in direct tension with this Court's holding in *Harris* that the sentencer, after considering mitigation evidence, is not required to ascribe a certain weight to that mitigation evidence.

The dissent correctly recognized that Robinson cannot demonstrate prejudice because the state post-conviction court, the same judge who had sentenced Robinson, considered all of Robinson's mitigation and found it would not have changed the outcome.

I

THE COURT OF APPEALS' FAIR PRESENTATION HOLDING EVISCERATES THE REQUIREMENT THAT HABEAS PETITIONERS FAIRLY PRESENT THEIR CLAIMS TO THE STATE COURTS

A petitioner seeking federal writ of habeas corpus must exhaust all available state court remedies before a federal court may grant him habeas relief. *Duncan v. Henry*, 513 U.S. 364, 365 (1995). This requirement, codified in 28 U.S.C. § 2254, is necessary to give the State the "opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Picard v. Connor*, 404 U.S. 270, 275 (1971). The focus of this doctrine is on the "fair presentation" of the federal claim in state court. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004). The state prisoner must describe in the state proceedings both the operative facts and the federal legal theory on which his claim is based. *Anderson v. Harless*, 459 U.S. 4, 6 (1982). Raising a "somewhat similar" claim in state court does not fairly present the claim for purposes of federal habeas review. *See Picard*, 404 U.S. at 277–78.

In his direct appeal in state court, Robinson made various conclusory and general arguments that "imposition of the death penalty was in violation of the statute and of the Constitution of the United States." Pet. App. A at 26. The specific argument Robinson made in state court regarding the cruelty prong of the A.R.S. § 13–703(F)(6) aggravator was focused on the lack of evidence that the victim *actually* suffered pain or mental distress. His complete argument was:

> Cruelty involves the infliction of pain and distress on the victims. The State must show by evidence that the victim *actually* suffered physical or mental pain prior to the death. Cruelty is not shown if the evidence is inconclusive. *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983). The State produced *no* evidence to show that the victim actually suffered pain or distress to the extent necessary to make this finding. Mr. Hill testified that he was not aware of what occurred because he was knocked out, not shot. Mrs. Hill's last words, as heard by Mr. Hill, concerned a desire that her feet be covered up, not a plea for mercy or an expression of fear that she was about to be killed. There is no concrete evidence to support the State's theory that Mr. Hill was shot first but even if he was, Mrs. Hill was shot almost immediately thereafter without waiting a long time to be shot.

Pet. App. A at 56–57; Pet. App. B at 26. The Arizona Supreme Court addressed the cruelty factor in the context that Robinson had presented it. *Robinson*, 796 P.2d at 862-63.

In Claim 6(A) of his habeas petition, however, Robinson argued that, because no evidence existed that he personally intended or should have reasonably foreseen that the victim would suffer, the state courts' cruelty finding under the (F)(6) aggravating circumstance was arbitrary, in violation of his rights under the Eighth a Fourteenth Amendments. Pet. App. B at 26. The district court concluded that this claim was "substantially different" from the cruelty issue raised on direct appeal, thus it was not fairly exhausted. Pet. App. B

at 27.

The panel majority disagreed. Rather than discuss the claim in Robinson's direct appeal brief that concerned his attack on the cruelty finding, the panel majority discussed instead the portions of his brief that generally attacked Arizona's death penalty grounded in the Ninth Circuit's decision in *Jeffers v. Ricketts*, 832 F.2d 476 (9th Cir. 1987) (finding (F)(6) unconstitutional), *rev'd sub nom. Lewis v. Jeffers*, 497 U.S. 764 (1990). Pet. App A at 26–27. It is true that Robinson argued in this general attack on the death penalty that "it must be remembered that Robinson was not even in the house and had no part in the actual shooting." But this statement was unrelated to his claim attacking the trial court's cruelty finding. As "fair presentation," the majority also relied on the closing paragraph after Robinson's attack on the trial court's *heinousness* and *depravity* finding:

> It is noted that the Appellant Robinson did not participate in the killing, did not intend anyone to die and did not exhibit a reckless indifference to the value of human life. He was not involved directly with the shooting. Neither the conduct of the others involved, much less Appellant Robinson's, prove this factor beyond a reasonable doubt.

Pet. App. A at 28. In concluding these statements exhausted his claim, the panel majority stated Robinson "was required only to present to the state court the legal and factual basis of his federal constitutional claim." Pet. App. A at 28–29. The majority is clearly mistaken—Robinson is required to do more. He must *fairly* present the claim so that the reviewing court has an opportunity to understand and address the nature of the federal claim he is

presenting. It is fundamentally unfair for a court to cobble together a new legal theory from unrelated claims years later as a basis for finding that the claim has been "fairly presented" to the state court. *See Keating v. Hood*, 133 F.3d 1240, 1241-42 (9th Cir. 1998) (although both in state and federal court the claim was based on aiding and abettor liability, the legal theory of the claim was different in state court from the one presented in federal court).

In *Henry*, this Court held that mere similarity in claims is insufficient to exhaust in the habeas context. 513 U.S. at 366 (citing *Picard*, 404 U.S. at 276; *Harless*, 459 U.S. at 6). The claim Robinson made in state and federal court argued the arbitrariness of the cruelty aggravating factor. The theory upon which he argued the arbitrary nature, however, was significantly different. The state court only had the opportunity to pass upon the question Robinson raised—whether there was sufficient evidence that the victim suffered pain to prove cruelty. The state court did not have the opportunity to address Robinson's later allegation that there was insufficient evidence of his intent to inflict pain or reasonably foresee that the victim would suffer pain.

As the dissent noted, the majority's reliance on Robinson's citation to *Jeffers* is unpersuasive. Pet. App. A at 59. In fact, Robinson's citation to *Jeffers* only underscored his argument in state court on the alleged lack of pain to the victim, not his later argument relating to intent or foreseeability.

The majority's vicarious liability discussion is unpersuasive because it is not based on authority from this Court and instead relies on case law from the Arizona Supreme Court decided more than a decade after it decided Robinson's appeal. *See State*

v. Carlson, 48 P.3d 1180 (Ariz. 2002). Moreover, the Arizona Supreme Court's ruling in the *Carlson* case dealt with the heinous and depravity prong of Arizona's (F)(6) aggravating factor, not cruelty.

Because under Arizona law, cruelty alone is sufficient to sustain the (F)(6) aggravator, there is no need to revisit the panel majority's decision concerning the heinous/depravity prong. Nevertheless, the panel majority was also mistaken when it found that application of the heinousness and depravity prong was unconstitutional. The majority agreed that the state court's finding of "senselessness and helpless" did not render their finding arbitrary. Pet. App. A at 40. Rather, the majority concluded that the arbitrariness derives from "the lack of evidence that Robinson was present for, or ordered, the killing of Sterleen." Pet. App. A at 42. But that analysis ignores the overwhelming evidence that Robinson "set the murder in motion." Pet. App. A at 62 (Rawlinson,J., dissenting). Habeas review is not a proceeding where federal courts are permitted to simply substitute their own judgment for the factual conclusions by the state courts. *See Maggio v. Fulford*, 462 U.S. 111, 113 (1983) (*per curiam*).

Finally, the court of appeals' improper fair presentation analysis affected not only its finding regarding the (F)(6) aggravating circumstance, but also its ruling regarding Robinson's ineffective assistance of counsel claim. As set forth in the next argument, the court of appeals compounded its erroneous finding that Robinson fairly presented his argument on the cruelty aggravating factor when it found that the state post-conviction court inappropriately relied on this aggravating factor in finding that Robinson failed to demonstrate any prejudice from his counsel's alleged failure to present

mitigation. Pet. App. A at 53.

II

THE NINTH CIRCUIT'S ERRONEOUS *STRICKLAND* PREJUDICE ANALYSIS IGNORED THIS COURT'S PRECEDENT AND CREATED A NEW REQUIREMENT IN CAPITAL CASES WHERE THE SENTENCER MUST GIVE WEIGHT TO PROFFERED MITIGATION EVIDENCE

The court of appeals' decision that the state court and district court under-weighted Robinson's additional mitigation ignored this Court's ruling in *Harris v. Alabama* and essentially holds that the state court must give particular weight to proffered mitigation. In reaching its prejudice decision, the court misconstrued Arizona law in finding that the state court used an unconstitutional nexus test in considering Robinson's additional mitigation.

The Sixth Amendment obligates criminal defense counsel to provide objectively reasonable assistance under prevailing professional norms. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). The attorney is expected to make reasonable investigations, the reasonableness of which may be "substantially influenced" by his clients statements or actions. *Id.* at 691; *see also Rompilla v. Beard*, 545 U.S. 374, 383 (2005) (reasonable investigation does not mean global searches); *Wiggins v. Smith*, 539 U.S. 510, 533 (2003) (in some cases, mitigating evidence might not be required). Without the "distorting effects of hindsight," if counsel's performance has been so objectively unreasonable and deficient to overcome the "strong presumption" that it was within "the wide range of reasonable

professional assistance," a reviewing court may only reverse if the defendant establishes that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," a probability sufficient to undermine the confidence in the result. *Strickland*, 466 U.S. at 694.

In assessing mitigation evidence, this Court has established that a capital sentencing process that excludes from consideration circumstances of the particular offense or the relevant facets of the character and record of the individual offender violates the Eighth Amendment. *Eddings v. Oklahoma*, 455 U.S. 104, 113–14 (1982); *Lockett v. Ohio*, 438 U.S. 586, 605–06 (1978). The Eighth Amendment requires that the sentencer have the ability to consider and give effect to mitigation evidence. *Smith v. Texas*, 543 U.S. 37, 45 (2004). This Court, however, has never required the sentencer to place particular weight to mitigation evidence. *Harris*, 513 U.S. at 512.

In his state post-conviction proceedings, Robinson claimed that his trial counsel was ineffective for failing to investigate and present mitigation evidence. After a two-day evidentiary hearing in which Robinson presented additional mitigation, the state court post-conviction court—the same judge who sentenced Robinson to death—determined that the new information would not have changed his sentence. The state court found that Robinson's additional mitigation evidence, particularly his mental health and horrific childhood, had little connection or effect on his behavior at the time of the murder. Thus, the court found this mitigation to be of little weight.

The court of appeals found that the trial court improperly found that "Robinson was not prejudiced because Robinson failed to establish a causal connection between the mitigating evidence and the crime." Pet. App. A at 51.

The federal district court, in rejecting Robinson's ineffective assistance claim, noted that Robinson was over the age of forty at the time of the offenses. (Pet. App. C. at 46.) And the district court discussed Arizona law that held during the weighing phase of assessing mitigating impairments unrelated to the crime, such impairments generally are not accorded much "weight." *Id.* at 46-47. The Ninth Circuit majority rejected this analysis, confusing this discussion of weighing with the Supreme Court's proscription against precluding the sentencer from "considering and giving effect" to certain mitigation. *See, e.g., Smith,* 543 U.S.at 47; *Penry v. Lynaugh,* 492 U.S. 302, 328 (1989); *Lockett v. Ohio,* 438 U.S. 586, 605-06 (1978) (plurality opinion). This Court has never told the sentencer (judge or jury) how it must weigh or give effect to mitigation. *Harris,* 513 U.S. 504, 512 (1995). The Ninth Circuit's decision in this regard ignores this precedent and creates a new requirement for sentencers in capital cases.

Moreover, Robinson cannot demonstrate prejudice in light of this Court's decisions in *Wong v. Belmontes*, 558 U.S. ___, 130 S. Ct. 383 (2009) and *Bobby v. Van Hook*, 558 U.S. ___, 130 S. Ct. 13 (2009). The dissent correctly found that "[T]he Supreme Court's rulings in *Van Hook* and *Wong* clarify that these asserted failings [in this case] cannot support a claim under *Strickland*." Pet. App. A at 62–63.

In *Wong v. Belmontes*, for example, this Court

found that, even without the State's rebuttal evidence of a second murder, it was "hard to imagine" how new expert testimony and additional facts about Belmontes' difficult childhood outweighed the state court's determination that Belmontes was convicted of an intentional brutal murder. 130 S. Ct. at 391. Furthermore, as the panel dissent noted in Robinson's case, the panel did not have to determine whether the claimed deficiencies would have made a difference, because the sentencing judge declined to change Robinson's sentence after hearing all the mitigation evidence mustered after-the-fact in the post-conviction evidentiary hearing. Pet. App. A at 64.

In contrast to the dissent's correct reliance on *Belmontes* and *Van Hook*, the Ninth Circuit majority dismissed those cases in a footnote citing to the recent *per curiam* decision, *Porter v. McCollum*, 558 U.S.___, 130 S. Ct. 447 (2009), which the Ninth Circuit found to be "closely similar" to Robinson's case. Pet. App. A at 49. However, that case is markedly different from the instant case. The state prisoner there, George Porter, was "a wounded and decorated" Korean War veteran whose heroic combat service in two major engagements "left him a traumatized, changed man." *Porter*, 130 S. Ct. at 448. "His commanding officer's moving description of those two battles was only a fraction of the mitigating evidence that his counsel failed to discover or present during the penalty phase of his trial in 1988." *Id.* Robinson had no heroic military service, did not fight in any horrific battles, nor suffered any mental or emotion toll because of service for his country. Furthermore, in contrast to *Porter*, here the record revealed how the sentencer actually evaluated the new information. The very judge who sentenced Robinson to death ruled that the new information (found persuasive by the Ninth Circuit) would not have changed the sentencing

decision.

CONCLUSION

This case merits review to settle issues important to habeas review of federal claims raised in state courts. The Ninth Circuit's finding that Robinson fairly presented to the state court his new theory he argued in federal court directly conflicts with this Court's jurisprudence and eviscerates § 2254(b)(1). The Ninth Circuit further compounded its error by finding that the state post-conviction court improperly considered the aggravating factor in its analysis of Robinson's ineffective assistance claim. Finally, the Ninth Circuit's *Strickland* prejudice analysis continues to conflict with this Court's holding in *Harris v. Alabama* and is contrary to this Court's recent decisions foreclosing a finding of prejudice where the additional mitigation presented would not have made a difference in the sentencing decision.

Respectfully submitted

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Fred Lawrence Robinson, *Petitioner-Appellant*,	)	No. 05-99007
v.	)	D.C. No. CV-96-00669-JAT
Dora B. Schriro, Director, *Respondent-Appellee*.	)	OPINION

Appeal from the United States District Court
For the District of Arizona
James A. Teilborg, District Judge, Presiding

Argued December 6, 2007
Submitted February 19, 2010
San Francisco, California

Filed February 22, 2010

Before: Betty B. Fletcher, Marsha S. Berzon, and Johnnie B. Rawlinson, Circuit Judges.

Opinion by Judge B. Fletcher;
Dissent by Judge Rawlinson

COUNSEL

Patrick McGillicuddy, Phoenix, Arizona, for the petitioner-appellant.

Terry Goddard, Attorney General, Kent Cattani, Chief Counsel, Capital Litigation Section, J. D. Nielsen, Assistant Attorney General, and Jeffrey A. Zick (argued), Assistant Attorney General, Capital Litigation Section, Phoenix, Arizona, for the respondent-appellee.

OPINION

B. FLETCHER, Circuit Judge

Petitioner Fred Lawrence Robinson appeals the district court's denial of his Petition for Writ of Habeas Corpus. Robinson faces a death sentence imposed by the state of Arizona for the murder of Sterleen Hill. Robinson sought relief from his sentence and conviction on ten grounds in his petition to the district court. Following denial of the petition, the district court granted a certificate of appealability as to four issues, and we subsequently certified an additional five issues for appeal. We have jurisdiction over this pre-AEDPA appeal pursuant to 28 U.S.C. § 1291 and reverse in part and remand in part the district court's determination. We hold that the Arizona courts arbitrarily found that Robinson committed the murder in an especially cruel, heinous, or depraved manner in violation of the Eighth Amendment and that Robinson received ineffective assistance of counsel at sentencing

in violation of the Sixth Amendment. We reverse the district court's denial of those claims and remand to the district court for issuance of a writ of habeas corpus striking the application of the especially cruel, heinous, or depraved aggravating factor to Robinson and ordering a new sentencing proceeding. We affirm the district court's denial of Robinson's remaining claims in a memorandum disposition filed concurrently with this opinion.

I. Factual and Procedural Background

A. The Crime[FN1]

FN1. Except as noted, we base our recitation of the facts on the Arizona Supreme Court opinion upholding Robinson's conviction and sentence on direct appeal. *See State v. Robinson*, 165 Ariz. 51, 796 P.2d 853 (1990).

At around 6 p.m. on June 8, 1987, Robinson drove from Banning, California, to Yuma, Arizona with two friends, Theodore Washington ("Washington") and Jimmy Lee Mathers ("Mathers"). Earlier that afternoon, Robinson told his son, Andre, that the three men were going to Yuma to see if Susan Hill ("Susan"), Robinson's common law wife, was there. As Andre looked on, the three men loaded two handguns and a shot gun into Robinson's car.

At around 11:30 p.m., Sterleen Hill ("Sterleen"), Susan's stepmother, heard sounds outside the Hills' house in Yuma. She told her son LeSean to investigate, but he saw no one. At approximately 11:45, someone

knocked on the door. When LeSean opened it, a man identified himself as James and told LeSean that he had some money for Ralph Hill ("Ralph"), Susan and LeSean's father. When LeSean opened the door to accept the money, the man, whom LeSean believed to be a black man, attempted to grab him. LeSean escaped the man's grasp, fled the house, and ran to a neighbor's house to call the sheriff.

As LeSean fled his house, two people entered the home. One of these was later identified by Ralph as a black man with a red bandana who was not Robinson. Ralph heard the intruders say that they were narcotics agents and that they wanted the drugs and the money. The intruders forced Sterleen and Ralph to lie face-down on the floor of their bedroom and bound their hands and feet with electrical cords and neckties. The intruders repeatedly asked where the money was and searched through the bedroom closet and dresser. When Sterleen asked that her feet be covered up, the Hills were both shot in the back with a shotgun. Ralph survived with severe injuries, but Sterleen died. A girl who lived across the street heard what sounded like gunshots and then heard footsteps on the gravel outside, muffled voices say "hurry up," a car door slam, and a car driving away.

Shortly after the shootings, Deputy Koteles, who was responding to LeSean's emergency call, saw Robinson driving near the Hills' house. When Robinson passed Koteles, Robinson smiled and accelerated as he passed. Robinson was apprehended in his car shortly thereafter on a road near the Hills' home. Deputy Koteles found several bullets in Robinson's pants

pockets. Mathers was apprehended the next day after Susan Hill, who had heard about the shooting and was on her way to Yuma after stopping in Banning, saw Mathers walking along the road in the direction of Banning. Washington, who had called his girlfriend at 2:00 a.m. on June 9th to tell her that he was stranded in Yuma, was apprehended in Banning several days later.

Subsequent to the shootings, the police found several pieces of evidence in the fields surrounding the Hill house, including Robinson's shotgun, several spent and unspent shotgun shells, a revolver cylinder, a bag containing several bullets, and a coat that appeared to belong to Washington. The police also found evidence in Robinson's car, including a box of shotgun shells, a red bandana (on which hairs probably belonging to Mathers were found), and a piece of paper with the Hills' address on it, which had probably been written by Robinson.

In front of the Hills' home, the police found footprints which they believed belonged to Robinson, although they did not have a forensic expert evaluate the prints. There was no evidence, however, that Robinson had been inside the home. No fingerprints of his were found inside the house, on the shotgun, or on any other items believed to have been used in the shooting. Moreover, neither LeSean nor Ralph Hill identified Robinson as having been one of the intruders, even though Ralph knew Robinson and was shown a photo lineup containing Robinson's photo.

B. The Trial

1. Guilt Phase

The three men were tried together. The prosecution's theory at trial was that Robinson had recruited Washington and Mathers to go with him to Yuma to kidnap Susan Hill. The prosecution's evidence established that Robinson had brought guns on his trip to Yuma, had been present in front of the Hills' house, and had driven away after the shooting. But the prosecution neither argued nor presented evidence that Robinson entered the residence or participated in the actual shooting. In fact, Ralph specifically testified that the person he saw was not Robinson. Additionally, the prosecution presented no evidence or argument that Robinson had instructed Washington and Mathers to kill the Hills, much less tell them how to do so.

As further evidence of Robinson's motive, the prosecution presented evidence of two other occasions on which Robinson attempted to get Susan to return to him. The first time, in June 1986, Susan was staying with her sister in North Hollywood, California. Two men entered the house one after the other, threatened Susan's sister and 11-year-old niece with handguns, and tied up their hands with stockings. Approximately two minutes later Robinson entered the house, by which time the niece had already been untied. Robinson had the sister take him to Susan, who was hiding in the bedroom closet. Robinson then cut the stockings off of the sister's hands, told her to return to the living room, and spoke to Susan for about half an hour. During the conversation, Robinson tried to make

Susan believe that he missed her and wanted her to come back to him, but he also told Susan that he had come with the intention of killing her and her sister and that the only thing that stopped him was that Susan's niece was there. The next day, Susan left with Robinson for Banning.

The second occasion was in January of 1987, after Susan went to Philadelphia to stay with family without telling Robinson where she was going. When Robinson eventually located her, he went to Philadelphia with Mathers, lured Susan to him through a ruse, grabbed her, and took her back to Banning.

All three defendants were found guilty of first-degree murder, attempted first-degree murder, two counts of aggravated assault, first-degree burglary, and armed robbery.

2. Sentencing Phase

The prosecution changed its theory of the case at sentencing. The new theory was that Sterleen died as a result of a drug deal gone bad. Accordingly, the prosecution argued two statutory aggravating circumstances: (1) the defendants committed the offense in expectation of the receipt of something of pecuniary value, and (2) the defendants committed the offense in an especially cruel, heinous, or depraved manner. Additionally, the prosecution specifically argued that the possibility that the conviction rested upon felony-murder was not a mitigating circumstance in this case because there was no doubt of the

defendants' specific intent to kill.

In his sentencing memorandum, Robinson's attorney, Robert Roberson made several arguments. First, Roberson argued that the Supreme Court's opinions in *Enmund v. Florida,* 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), and *Tison v. Arizona,* 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), counseled against sentencing Robinson to death because Robinson was not present at the scene of the killing and the prosecution could not show beyond a reasonable doubt that Robinson intended to kill or acted with a reckless indifference to human life. Second, Roberson argued that the prosecution could not prove the statutory aggravating circumstances beyond a reasonable doubt. Third, he argued that two statutory mitigating circumstances applied: (1) that Robinson was a minor participant in the offense, and (2) that it was not reasonably foreseeable that Robinson's conduct would cause or create a grave risk of death to another person. Finally, he briefly argued that Robinson could not be sentenced to death because he was convicted under the felony murder rule. Roberson did not present any non-statutory mitigating factors in his sentencing memorandum.

The court held a single aggravation/mitigation hearing for the three defendants. The prosecution presented several witnesses, including Major Ralph Ogden, chief deputy for the Yuma County Sheriff's office. Ogden testified about statements made to him by Robinson's co-defendant Washington after the arrest, but the Arizona Supreme Court later deemed this testimony inadmissible under the Confrontation Clause.

According to Ogden's second-hand account, Robinson told Washington when they arrived in Yuma that they were going to "knock off a dope dealer, take his coke and take the cash." He also instructed them that after Washington and Mathers had gone up to the house, Washington would knock on the door, and that when somebody opened it, the two men would enter and "put the people down," meaning "get them in chairs or whatever." At that point, Robinson would enter because he knew where the cocaine and the money were located. According to Ogden, Washington told him that there was no specific plan to kill anybody, but that Mathers was to carry a shotgun and Robinson told his accomplices, "if things get rough, shoot 'em."

Sergeant Roy Brock, also with the Yuma County Sheriff's office, testified at the sentencing phase about statements that Robinson had made to him after the murder. These statements indicated that the purpose of the trip to Yuma was to "rip off" some drug dealers. But according to Robinson, Washington and Mathers drove to Yuma in a different car and went to the wrong house, where they proceeded to commit the crime.[FN2]

FN2. The county also called Dr. Bruce Shirer, a pathologist who performed the autopsy on Sterleen Hill and had testified at trial. Shirer testified that there was no evidence of head trauma that would indicate that Sterleen had been knocked unconscious; on cross-examination he acknowledged that it was nevertheless possible that she was knocked unconscious shortly before being shot. Ralph Hill testified at the aggravation/mitigation hearing, but his testimony was

directed only toward sentencing for the non-capital offenses for which the defendants were convicted.

Roberson cross-examined the state's witnesses, but did not call any of his own. In his closing argument, Roberson again focused on the aggravating factors and urged the court to find that the county had not proved the aggravating factors beyond a reasonable doubt. With respect to mitigation, Roberson relied on his sentencing memorandum, making only a brief argument that Robinson "[didn't] have a history of harming people" and was "a good father apparently." [FN3] Altogether, Roberson's closing argument consisted of just over ten pages of double-spaced transcript.

FN3. The following is the full extent of Roberson's closing argument on mitigation:

I can cite a whole lot of mitigating factors as far as Fred is concerned. I can cite a couple that may have a little bearing. Fred, at least as far as the evidence we have received in court, doesn't have a history of harming people. He may have a history, as shown by the evidence, of going after Susan and being involved in some shenanigans that way, but he never hurt anybody as far as we know by the testimony. He is a good father apparently. He has-I don't remember what the testimony is-9, 12, 15 kids or something by several different women. He apparently has custody of almost all of them. Even Susan had to testify Fred was a good father. The kids loved him. They were taken care of, fed, clothed, sent off to go to school. The kids testified about having to go to school, getting homework done. They had newspaper routes. I don't think we can show

Fred is some kind of ogre who is a total and has no redeeming value. I think from the fact he was able to raise, from what I could see from testimony, 2 pretty good kids and presumably the other children just as well as those 2. He is able to care for them. He is able to. They love him. I think that's a little mitigation for him.

The court sentenced Robinson to death.[FN4] The sentencing judge found three statutory aggravating factors justifying the sentence: (1) Robinson procured the commission of the offense by the payment or promise of receipt of something of pecuniary value by the other defendants; (2) Robinson committed the offense for the purpose of receipt of something of monetary value; and (3) Robinson committed the offense in an especially heinous, cruel, or depraved manner. With respect to mitigating circumstances the court found that (1) Robinson's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was not impaired; (2) Robinson was not under duress; (3) Robinson was not a minor participant in the crime; (4) it was reasonably foreseeable that the offense would create a grave risk of death; (5) Robinson's age (46 at the time of the murders) was not a mitigating factor; and (6) "no other mitigating circumstances were presented by the defendant for consideration." Because the trial court found at least one statutory aggravating circumstance and no mitigating circumstances, it was bound under then-existing Arizona law to apply the death penalty. *See* Ariz.Rev.Stat. 13-703(E) (1988) (current version at Ariz.Rev.Stat. § 13-751).

FN4. Under Arizona law at the time of Robinson's sentencing, the trial judge, not the jury, determined whether aggravating circumstances applied. Although the Supreme Court invalidated this sentencing scheme in *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), *Ring* does not apply retroactively to cases on collateral review. *Schriro v. Summerlin,* 542 U.S. 348, 358, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004).

C. State Appeals and Federal Habeas Corpus Review

1. Direct Appeal

All three defendants appealed their convictions and sentences. The Arizona Supreme Court vacated Mathers's conviction, *State v. Mathers,* 165 Ariz. 64, 796 P.2d 866 (1990), but upheld the convictions of Robinson and Washington, *State v. Robinson,* 165 Ariz. 51, 796 P.2d 853 (1990). Before the Arizona Supreme Court, Robinson argued that various evidentiary rulings in the trial court were in error and that his sentence should be vacated because "(1) the killing was not committed for pecuniary gain, (2) the killing was neither depraved nor heinous, nor was it cruel, and (3) a further hearing was required regarding the presence of *Tison* and *Enmund* considerations." *Id.* at 858. Although it upheld Robinson's sentence, the court held that only two of the three aggravating circumstances found by the sentencing court were supported by the evidence. *Id.* at 861-63. The court held that the testimony of Major Ogden as to the statements made to him by Washington was inadmissible because it violated Robinson's Sixth Amendment right to confront

a witness against him. *Id.* at 861-62. As a result, the court set aside as insufficiently supported the sentencing court's finding that Robinson committed the murder in expectation of something of pecuniary value. *Id.* at 862. As for mitigating circumstances, the court stated, "Robinson offered no mitigating circumstances and we agree with the trial court that none exist." FN5 *Id.* at 863. As a result, the court held that "no mitigating circumstances exist so as to warrant vacating ... Robinson's ... death sentence[ ]." *Id.* at 864. The court also concluded that "imposition of the death penalty in the present case is proportional to the sentences imposed in similar cases," and that the district court did not commit fundamental error. *Id.* at 865.

FN5. As explained above, Robinson's counsel did in fact argue very briefly for two statutory mitigating circumstances and two nonstatutory mitigating circumstances. That the Arizona Supreme Court wrongly believed that Robinson had offered no mitigating circumstances accentuates only the feebleness and brevity of counsel's effort.

2. State Post-Conviction Relief Proceedings

Robinson then brought a petition for post-conviction relief in Arizona state court, making the same arguments that he made on direct appeal and adding a claim for ineffective assistance of counsel. The same superior court judge who presided over Robinson's trial also presided over Robinson's post-conviction proceedings. The court conducted an evidentiary hearing on the ineffective assistance of counsel claim.

The court heard testimony from Juan Gonzales, a corrections parole officer; Robert Roberson, Robinson's trial counsel; and Dr. Tod Roy, a psychologist who examined Robinson in preparation for the evidentiary hearing.

a. Gonzales

Gonzales's testimony focused on Robinson's good behavior in prison. Gonzales testified that Robinson had frequent contact with members of his family, both by mail and by telephone. Gonzales also testified that Robinson had only two minor disciplinary problems in four years and was classified as Level Five-One, the lowest security level possible for a death row inmate, "which means ... they do what they are told and never get in trouble." Gonzales testified that Robinson was an insulin-dependent diabetic and that he got along well with other inmates, went to church regularly, and had adjusted well to life in prison. Gonzales believed that Robinson would do well if he were placed in the general prison population.

b. Roberson

Roberson testified about his educational and professional background and about his preparation for the guilt and penalty phases of the trial. At the time of the evidentiary hearing, he had been practicing for about twenty years, splitting his time more or less equally between criminal and civil work, and thought, although he was not sure, that he had tried at least one death penalty case prior to Robinson's. He explained that after being assigned to Robinson's case,

he stopped taking new civil matters so that he would have more time for Robinson. He did not apply for funds for a private investigator, noting that "back during those days we were all doing pretty much our own investigation."[FN6] Likewise, he did not hire medical or mental health experts, stating that he never observed any mental deficiencies, that Robinson never "gave [him] any indication that there was some mental problem that he might like to explore," and that he never got "any inkling" that there was "any kind of a mental problem or psychological explanation ... that might have led to Fred's involvement in this case."

FN6. The court agreed that "it was rather rare for the court either to hear or grant a request for outside investigators."

Turning specifically to the penalty phase, Roberson acknowledged that any type of mitigating evidence could be presented at sentencing, not just the five statutory circumstances, and that the nonstatutory factors included potential for rehabilitation, remorse, and family ties. He also acknowledged that the full extent of his investigation was talking to Robinson, and he explained that he did not feel that he could present evidence of remorse or family ties because Robinson insisted he was innocent and two of his sons had testified against him. He acknowledged that he did not subpoena school, medical, mental, or employment records for Robinson, but did not provide any explanation for why he did not do so. He acknowledged that in hindsight he should have consulted a psychologist or psychiatrist, but said that at the time he did not think it was necessary based on what

Robinson had told him. Finally, he acknowledged that he did not call any witnesses on Robinson's behalf.

c. Roy

Dr. Roy testified as to the results of his psychological evaluation of Robinson. In preparing his report, Roy conducted fourteen hours of face-to-face interviews and testing with Robinson and interviewed Robinson's father.

Roy described a "number of experiences in [Robinson's] development that I think contributed to how he viewed people[, e]specially in close relationships." These included repeated childhood sexual abuse, the repudiation of Robinson's siblings by his father, and physical and emotional abuse by his father and stepmother.

According to Roy's report, Robinson was born and spent his formative years in a poor, segregated rural community in Texas. He described his childhood as close knit until his parents separated when he was nine or ten. His parents' divorce was particularly difficult for Robinson because his father rejected the younger children in open court and the children were separated. Robinson and the older siblings went to live with his father, and the younger siblings stayed with his mother.

Shortly after the divorce, Robinson's father remarried. His new stepmother had five children of her own and they all lived in a very small house. Robinson felt that he and his biological siblings were treated worse than

his step-siblings; for example, the step-siblings ate meals first and Robinson and his siblings ate the leftovers. Robinson reported being beaten with a switch or a belt approximately every other day for minor infractions reported by his stepmother. Things improved when the family moved to a larger house, although there was still conflict. In particular, when Robinson was in high school he worked to save money for a car; not twenty-four hours after he purchased it, his father told him that he and Robinson's stepmother had decided that Robinson would have to give his car to an older stepbrother who in their estimation needed it more because he was going to college. Robinson continues to resent his father for doing this, although he says he forgave him.

Robinson also experienced several incidents of sexual abuse. First, his stepmother's boyfriend sodomized him at knifepoint and threatened him with death if he told anyone. Second, when he was about nine years old, he witnessed his sister being raped by a white man. Finally, as a young boy he had an aunt who repeatedly performed oral sex on him and forced him to do the same to her. Dr. Roy remarked at the evidentiary hearing that Robinson "was tearful and very reluctant to talk about [the rape]. And it was my impression that I was the first person to whom he had disclosed that." Roy described the significance of this type of incident to a child:

It's significant because-especially a rape of that nature-it brings very quickly to one's awareness how powerless one is over the power of someone else, for one. And I believe his life was threatened if he told

anyone. One's achievement, one's desire to do things can be robbed when arbitrarily they are taken from us, and for reasons that aren't reasonable and questionable entitlement. That would leave an individual with-who was somewhat confused, in terms of what to expect. It would also create a sense of dependency on these people, because they are the ones that have the power, and that power sometimes is utilized in inappropriate ways.

At the time of his conviction, Robinson had been unemployed and receiving disability benefits for approximately seven years. He became disabled as a result of a motorcycle accident which left him with a pronounced limp. Robinson also claimed that he suffered a head injury as a result of the accident, but according to Roy, Robinson's medical records after his accident "did not report any disturbances that would suggest organic brain damage."

Robinson has a very large family. In addition to seventeen siblings, he reported having fifteen children of his own with five different women. Several of these relationships ended or had problems because the women were cheating on him.

Robinson claims never to have used drugs. At the time of his conviction, he had numerous health problems, including diabetes, high-blood pressure, a broken hip, and poor vision. He had never been evaluated or treated by a mental health care provider until his post-conviction relief evaluation.

Roy diagnosed Robinson with Adjustment Disorder

with Anxious Mood (Axis I) and Borderline Personality Disorder with Dependent Features (Axis II), a character disorder that leads to a pattern of unstable relationships because of the psychological defense mechanisms of its sufferers. Roy concluded in his report that Robinson's character disorder resulted from his caretakers' disregard for him and his efforts.[FN7]

FN7. This diagnosis was challenged by the state's expert, Dr. Eva McCullars, who based her contrary diagnosis of Anti-Social Personality Disorder on her review of Roy's report and a brief interview with Robinson.

At the hearing, Roy testified that Robinson "had the potential to be rehabilitated," although there were concerns about the likelihood in light of his age and disability. He also stated that there was a "lack of ... data to support a hostility towards people." He found that Robinson had low intelligence, scoring an I.Q. of 81,[FN8] which is at the tenth percentile of adults, meaning his intelligence "would be exceeded by ninety percent of the adult population of this country." Dr. Roy also stated that he did not believe that Robinson had a predisposition or propensity towards violence, and that there was no risk of recidivism, although he said that he would recommend Susan stay away from him, because this crime "seems to be strictly related to the dynamics in that relationship [with Susan Hill] in his own psychology."

FN8. An I.Q. of 75 is considered mentally retarded.

The court ultimately denied Robinson's petition in its

entirety. With regard to Robinson's challenge to the application of the especially cruel, heinous, or depraved conduct aggravator, the court stated that "[n]othing has been presented here except a reiteration of the sentencing proceedings and findings of this court which were later reviewed and upheld on appeal," which did not "present a colorable claim."

The court was similarly unconvinced regarding Robinson's claim of ineffective assistance of counsel. The court found that Roberson was not ineffective at sentencing because (1) "[i]t was pretty much apparent that the defendant's family was not going to be the source of much mitigating testimony"; (2) evidence that Robinson was "a good and caring father" was balanced by evidence of Robinson's "aggressive and tyrannically possessive attitude concerning his 'family,' " including Susan Hill; and (3) there was no evidence that Robinson was "a minor player in the crime[.]" The court also found that Roberson was not ineffective in failing to request a psychological evaluation. The court accepted as true the finding that Robinson had "an antisocial personality disorder and was poorly adjusted to living in society," but found that there was nothing which would have "lessened his ability to differentiate right from wrong or to conform his actions with the law" at the time the murder was committed. The court also noted that there was nothing that would have suggested to Roberson that a mental examination would be helpful to Robinson. The court concluded that the results of Dr. Roy's examination would not have "altered the sentence imposed." Finally, the court rejected all of Robinson's claims of mitigating circumstances.

The Arizona Supreme Court subsequently denied Robinson's petition for review without opinion.[FN9]

FN9. Robinson filed a Second Petition for Post Conviction Relief in Arizona Superior Court on February 10, 1998. The state trial court denied the petition and the Arizona Supreme Court denied the petition for review. Robinson's second petition is not at issue in this appeal.

3. Federal Habeas Corpus

Robinson filed a preliminary habeas petition on March 14, 1996, in which he requested relief on ten grounds and sought appointment of counsel. Counsel was appointed and on May 6, 1997 an amended petition was filed. Robinson's amended petition made nine claims for relief: (1) ineffective assistance of counsel based on his attorney's conflict of interest; (2) a due process violation based on the trial court's refusal to give a requested lesser included offense instruction; (3) the "procurement for pecuniary gain" aggravating circumstance was unconstitutionally vague; (4) the prosecution's inconsistent motive theories violated his Fourteenth Amendment rights; (5) a violation of his Eighth and Fourteenth Amendment rights because the Arizona Supreme Court failed to conduct a harmless error analysis or re-weigh aggravating and mitigating circumstances; (6) the application of the "especially heinous, cruel or depraved" aggravating circumstance to facts of this case violated the Eighth and Fourteenth Amendments; (7) a violation of his Eighth and Fourteenth Amendment rights because there was

insufficient evidence that he killed, attempted to kill, or intended to kill; (8) ineffective assistance of counsel at sentencing; and (9) Arizona's execution statute violated the ex post facto clause and the Fourteenth and Eighth Amendments.

On August 8, 1999, the district court issued an order dismissing Claims 1, 2, 3, 4, and 6-A as procedurally barred and Claim 9 as withdrawn, and ordering briefing on the merits of the remaining issues. On March 17, 2005, the district court denied relief concluding that Claim 5 was procedurally barred and that Claims 6-B, 6-C, 7 and 8 lack merit. The court also concluded that Robinson was not entitled to an evidentiary hearing in district court on ineffective assistance of counsel. The district court granted a certificate of appealability on Claims 6-A, 6-B, 6-C, and 8. We subsequently granted a certificate of appealability on Claims 1, 2, 3, 4, and 5.

II. Standard of Review

We review the district court's denial of Robinson's habeas petition de novo, and the district court's findings of fact for clear error. *See Rios v. Rocha,* 299 F.3d 796, 799 n. 4 (9th Cir.2002). Because Robinson's federal habeas petition was filed before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214, pre-AEDPA law governs our consideration of the merits. *Correll v. Ryan,* 539 F.3d 938, 941-42 (9th Cir.2008) (citing *Lindh v. Murphy,* 521 U.S. 320, 327, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997)), *cert. denied sub nom. Schriro v. Correll,* --- U.S. ----, 129 S.Ct. 903,

173 L.Ed.2d 108 (2009); *Jeffries v. Wood,* 114 F.3d 1484, 1494 (9th Cir.1997) (en banc). Under pre-AEDPA law, we owe no deference to the state court's resolution of questions of law or mixed questions of law and fact. *See Williams v. Taylor,* 529 U.S. 362, 400, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Whether Robinson's trial counsel was ineffective is a mixed question of law and fact reviewed de novo. *Summerlin v. Schriro,* 427 F.3d 623, 628 (9th Cir.2005) (en banc) (citing *Rios,* 299 F.3d at 799 n. 4). We review the district court's findings of fact for clear error. *Lambright v. Schriro,* 490 F.3d 1103, 1114 (9th Cir.2007) (per curiam), *cert. denied,* 552 U.S. 1097, 128 S.Ct. 882, 169 L.Ed.2d 726 (2008). Dismissals based on procedural default are reviewed de novo. *Vang v. Nevada,* 329 F.3d 1069, 1072 (9th Cir.2003).

III. Discussion

In this opinion, we consider whether the Arizona state courts arbitrarily and capriciously applied the aggravating circumstance of especially cruel, heinous or depraved conduct to Robinson and whether Robinson received ineffective assistance of counsel at sentencing. Because we decide both issues in Robinson's favor, we reverse the district court.

A. Claim 6: Especially Cruel, Heinous, or Depraved Aggravating Factor

In his federal habeas petition, Robinson argued that the especially cruel, heinous, or depraved aggravating factor, Ariz.Rev.Stat. § 13-703(F)(6) (1988), was unconstitutional as applied to him. The district court

divided this claim into three parts:

(A) Insufficient evidence that Petitioner intended or reasonably foresaw the victim's suffering resulted in an arbitrary cruelty finding in violation of Petitioner's rights under the Eighth and Fourteenth Amendments;

(B) Insufficient evidence of Petitioner's involvement in the crime resulted in an arbitrary heinous/depraved finding in violation of Petitioner's rights under the Eighth and Fourteenth Amendments;

(C) The (F)(6) aggravating factor, as applied to Petitioners case, failed to sufficiently channel the sentencer's discretion in violation of the Eighth and Fourteenth Amendments.

The district court rejected claim 6-A as procedurally defaulted. Following briefing on the merits of the remaining claims, the district court concluded that sufficient evidence supported the state courts' findings that the murder was senseless and the victim helpless, and as a result, that the depravity prong of the aggravating factor properly applied to this case. But the court went on to note that even if the depravity finding was unconstitutional, the error was harmless because the state courts' cruelty finding was sufficiently supported by the evidence to apply the aggravating factor to Robinson. The court also denied Claim 6-C on the merits. We hold that both Claims 6-A and 6-B were adequately exhausted and entitle Robinson to relief. As we hold that the especially cruel, heinous, or depraved aggravating factor was unconstitutionally applied to Robinson pursuant to

Claims 6-A and 6-B, we do not reach Claim 6-C.

1. Procedural Bar

The procedural bar doctrine is a subcategory of the independent and adequate state ground doctrine. *See Boyd v. Thompson,* 147 F.3d 1124, 1126 (9th Cir.1998). The purpose of the doctrine is to protect the state's interests by giving it the opportunity to correct its own errors. *See Coleman v. Thompson,* 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Under this doctrine, a federal court ordinarily will not review a state court ruling if the state court would find that the claim was barred pursuant to an independent and adequate state procedural rule.[FN10] *Id.*

FN10. The federal court, however, will review the claim if the petitioner can show either cause and prejudice, *see Coleman,* 501 U.S. at 750, 111 S.Ct. 2546, or a fundamental miscarriage of justice, *see Murray v. Carrier,* 477 U.S. 478, 495, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986), or if the government waived the procedural default, *see Franklin v. Johnson,* 290 F.3d 1223, 1230, 1233 (9th Cir.2002).

We recognize two types of procedural bars: express and implied. An express procedural bar occurs when the petitioner has presented his claim to the state courts and the state courts have relied on a state procedural rule to deny or dismiss the claim. An implied procedural bar, on the other hand, occurs when the petitioner has failed to fairly present his claims to the highest state court and would now be barred by a state procedural rule from doing so. *See, e.g., Beaty v.*

Stewart, 303 F.3d 975, 987 (9th Cir.2002).

The district court concluded that Claim 6-A was subject to an implied procedural bar because it was substantially different from the cruelty issue raised on direct appeal, and Arizona Rule of Criminal Procedure 32.2(a)(3) would prohibit Robinson from returning to state court to exhaust the claim. We disagree with the district court's conclusion that Claim 6-A was not exhausted in Robinson's direct appeal of his conviction to the Arizona Supreme Court and conclude, as a result, that no implied procedural bar applies.

In order to exhaust his claim, Robinson was required to present both the factual and legal basis for the claim to the state court. *Weaver v. Thompson,* 197 F.3d 359, 364 (9th Cir.1999); *see also Gray v. Netherland,* 518 U.S. 152, 162-63, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996). To do so, Robinson was required to reference specific provisions of the federal constitution or cite to federal case law and to provide a statement of the facts that entitle him to relief. *Gray,* 518 U.S. at 162-63, 116 S.Ct. 2074; *Lyons v. Crawford,* 232 F.3d 666, 668, 670 (9th Cir.2000), *amended,* 247 F.3d 904 (9th Cir.2001).

In the Opening Brief he filed on direct appeal of his conviction to the Arizona Supreme Court, Robinson argued that "the imposition of the death penalty was in violation ... of the Constitution of the United States" because the especially cruel, heinous, or depraved aggravating factor was applied in an arbitrary manner. In support of his position, Robinson cited *Jeffers v. Ricketts,* 832 F.2d 476 (9th Cir.1987), *rev'd sub nom. Lewis v. Jeffers,* 497 U.S. 764, 110 S.Ct. 3092, 111

L.Ed.2d 606 (1990).[FN11] In *Jeffers*, we held that the especially cruel, heinous, or depraved aggravating factor was applied arbitrarily to Jeffers, in violation of the Eighth and Fourteenth Amendments, because there was no principled way to distinguish Jeffers's conduct from that in other cases where the Arizona courts had found that the behavior at issue was not especially heinous or depraved.[FN12] *Id.* at 483-85. In addition, Robinson argued that the murder was not especially cruel because it did not involve "the senseless or sadistic infliction of great pain" and pointed out that he was not in the house and did not participate in the actual shooting.[FN13]

FN11. The fact that the Supreme Court later held that the aggravating circumstance was not applied in violation of Jeffers' constitutional rights, *Jeffers*, 497 U.S. 764, 110 S.Ct. 3092, 111 L.Ed.2d 606, does not change the analysis. The citation to *Jeffers* is relevant to this discussion because it put the state court on notice that Robinson was arguing that his sentence violated the federal constitution. Moreover, at the time Robinson's appeal was decided, the Ninth Circuit opinion in *Jeffers* had not yet been overruled.

FN12. The Arizona Supreme Court had previously held that Jeffers did not commit the murder in an especially cruel manner. *Jeffers*, 832 F.2d at 483.

FN13. Robinson's briefing in the direct appeal of his conviction to the Arizona Supreme Court argued that application of the especially cruel, heinous, or depraved factor was unconstitutional because (1) there was no evidence that Sterleen Hill suffered, and (2) there was

no evidence Robinson participated in the murders. It is specious to assert, as the dissent does, that Robinson now agrees that Mrs. Hill suffered sufficiently to support a cruelty finding. Further, Robinson's two arguments against application of the especially cruel, heinous, or depraved factor are independent of each other. Even if Robinson had abandoned the first argument about Mrs. Hill's suffering we fail to see why-as the dissent seems to suggest-abandoning that argument would mean that he never made the second argument about his participation.

The district court erred by concluding that, in his direct appeal of his conviction to the Arizona Supreme Court, Robinson did not fairly present a claim based on lack of intent or foreseeability. Robinson argued that "the finding that his acts constituted especially cruel, heinous and depraved activity is unconstitutional," citing to *Jeffers* in support. Two pages later, he again asserted that "the imposition of the death penalty in this case was arbitrary and capricious and, therefore, unconstitutional." As part of this same discussion in his brief, he also fairly presented the factual basis for his claim, stressing that "[he] was not even in the house and had no part in the actual shooting." Earlier in his brief, while arguing against application of especially cruel, heinous, or depraved factor, he had already "noted that [he] did not participate in the killing, did not intend anyone to die," and "was not involved directly with the shooting." These arguments clearly exhausted the federal claim.

Robinson was not required to present his arguments in the same amount of detail to the two courts in support

of his federal constitutional claim; he was required only to present to the state court the legal and factual basis of his federal constitutional claim. Robinson clearly raised the constitutional issue by citing to a federal case that held that the application of the especially cruel, heinous, or depraved aggravating factor to the petitioner violated the Eighth and Fourteenth Amendments of the U.S. Constitution. He also specifically noted his lack of participation in the shooting in support of his claim. He thus presented the same claim he does now-that, given his lack of participation in the murder, a finding of especial cruelty, heinousness and depravity violated his rights.

It does not matter that Robinson now cites an intervening case, *State v. Carlson*, 202 Ariz. 570, 48 P.3d 1180 (2002), for the specific holding that the cruelty prong of the "especially cruel, heinous, or depraved" factor may not be applied to a defendant absent intent or reasonable foreseeability. *Carlson* postdates both Robinson's direct appeal and his amended federal habeas petition, so he could not have cited it. More importantly, Robinson's state-court argument was that the "especially cruel, heinous, or depraved" factor *as a whole* could not be constitutionally applied to him because there was no evidence of intent or reasonable foreseeability. His argument, therefore, encompassed the rule that the Arizona Supreme Court specifically adopted in *Carlson*.[FN14]

FN14. The dissent distorts the argument Robinson made in his briefing on direct appeal of his conviction to the Arizona Supreme Court. There he articulated

the "especially cruel, heinous, or depraved" factor as a *single* factor under Arizona law (as of course it is).

The dissent strains to impose a rigid separation on the arguments in Robinson's Arizona Supreme Court briefing, insisting that every time Robinson argued his lack of participation and intent, he intended it to relate only to the heinousness and depravity prongs of the factor but not to the cruelty prong. This interpretation is untenable. The two prongs are discussed together, in a section of Robinson's brief headed "Factor 6 of A.R.S. 12-703F." Though Robinson makes one argument-regarding the extent of the suffering of the victims-that is directed to the cruelty prong only, he ends this section of the brief with a final "not[e]" about Robinson's lack of participation or intent, concluding that paragraph with the statement, "Neither the conduct of the others involved, much less Appellant Robinson's, prove *this factor* beyond a reasonable doubt." (Emphasis added.) In the next section of the brief, in the course of discussing two relevant Supreme Court decisions, Robinson expanded on the facts demonstrating lack of intent and foreseeability. Contrary to the dissent's suggestion, the fair reading of the state court briefing is that Robinson argued that the "especially cruel, heinous, and depraved" factor *as a whole* was unconstitutionally applied in light of Robinson's lack of participation in the killings.

That Robinson's current arguments elaborate on those made in state court does not make his state-court presentation insufficient for purposes of exhaustion. In concluding otherwise, the dissent ignores governing law and substitutes an exhaustion standard that is

wholly unsupported in the case law. It fails to understand that as long as the "ultimate question for disposition" has remained the same in state and federal court, as it has here, "variations in the legal theory or factual allegations urged in its support" are entirely legitimate. *Picard v. Connor,* 404 U.S. 270, 277, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971) (quotation marks and citation omitted); *accord Lopez v. Schriro,* 491 F.3d 1029, 1040 (9th Cir.2007); *McKinney v. Artuz,* 326 F.3d 87, 97 (2d Cir.2003); *Boyko v. Parke,* 259 F.3d 781, 788-89 (7th Cir.2001); *Weaver v. Thompson,* 197 F.3d 359, 364-65 (9th Cir.1999).

This is not a case where the petitioner failed to make clear that he was invoking a federal right, *see, e.g., Anderson v. Harless,* 459 U.S. 4, 6, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982) (per curiam), or where the petitioner's "general appeal to a constitutional guarantee" was too vague to put the state court on notice of the federal claim, *cf. Shumway v. Payne,* 223 F.3d 982, 988 (9th Cir.2000) (holding that mere reference to "due process" and citation to a state law case that referenced the federal constitution for a proposition other than that for which the case was cited to the state court was insufficient to put the state court on notice of the federal claim). Robinson alleged violation of a narrow and specific constitutional guarantee-the right to be free from the arbitrary application of an aggravating factor, leading to the arbitrary imposition of the death penalty-and cited a federal court case, *Jeffers,* that held that right was violated because of the way in which the especially cruel, heinous, or depraved factor was applied to the petitioner in that case. He also alleged the factual basis for the claim: the manner of

the murder and specifically his lack of participation in the shooting. This combination was sufficient to present the bases of his federal claim to the state court. Accordingly, we hold that Robinson exhausted the claim in state court.

Because Robinson exhausted this claim in the state court, federal court review is barred only if the Arizona Supreme Court relied on a violation of a state procedural rule in rejecting the claim. *See Harris v. Reed,* 489 U.S. 255, 261-62, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989). In this case, the state supreme court, on direct appeal, rejected the claim on the merits. *State v. Robinson,* 796 P.2d at 858. Accordingly, we are not procedurally barred from reviewing Robinson's claim. *Cf. Vasquez v. Hillery,* 474 U.S. 254, 260, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (addressing merits of claim after determining that additional facts did not change substance of claim addressed by California Supreme Court).

2. Merits of Claims 6-A and 6-B

Robinson asserts that insufficient evidence supported the Arizona Supreme Court's application of the especially cruel, heinous, or depraved aggravating factor. To be applied to a defendant, an aggravating factor must be proved beyond a reasonable doubt. *Summerlin,* 427 F.3d at 642. Federal habeas corpus relief does not lie for mere errors of state law, but only for federal constitutional violations. *Jeffers,* 497 U.S. at 780, 110 S.Ct. 3092. Therefore, to grant habeas relief on an insufficient evidence claim we must conclude that the sentencing court's finding that the

murder was committed in an especially heinous, cruel, or depraved manner beyond a reasonable doubt was not only erroneous, but "was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation." *Id.* In making such a determination, the applicable standard of review is that of the "rational factfinder." *Id.* at 781, 110 S.Ct. 3092; *see also Martinez-Villareal v. Lewis,* 80 F.3d 1301, 1307 (9th Cir.1996). This means that "[a] state court's finding of an aggravating circumstance in a particular case-including a *de novo* finding by an appellate court that a particular offense is 'especially heinous ... or depraved'-is arbitrary or capricious if and only if no reasonable sentencer could have so concluded." *Jeffers,* 497 U.S. at 783, 110 S.Ct. 3092. Furthermore, as the especially heinous, cruel, or depraved factor is framed in the disjunctive, we must individually determine that the sentencing court's finding of both cruelty and heinousness and depravity were arbitrary to find that the application of the factor constituted a constitutional violation. *See State v. Gretzler,* 135 Ariz. 42, 659 P.2d 1, 10 (1983).

[17] The cruelty prong of the aggravating factor "relates to the physical and mental suffering of the victim during the murder." *State v. Carlson,* 202 Ariz. 570, 48 P.3d 1180, 1191 (2002). By contrast, "heinousness and depravity focus on the mental state of the defendant." *Id.* Robinson's challenges to application of both the cruelty and the heinousness and depravity prongs fundamentally run parallel. At bottom, Robinson asserts that the state courts' application of both prongs of this factor was arbitrary because there is no admissible evidence that Robinson

was present at, intended, or reasonably foresaw the murders. We agree. Applying the especially cruel, heinous, or depraved factor to Robinson based on the manner of a murder he neither intended, was present for, nor anticipated with reasonable certainty, is an application of Arizona law so arbitrary as to constitute an Eighth Amendment violation.

Our review of the record reveals no admissible evidence or argument placing Robinson inside the Hills' home at the time of the murder or evidence tending to prove that Robinson ordered the murder of the Hills. The prosecution never argued, nor was any evidence presented, that Robinson entered the Hills' home and was present for, let alone personally performed, the murder. The evidence shows, and the prosecution argued, only that Robinson drove Mathers and Washington with firearms to the Hills' home and was present outside the residence when the murder occurred. Nor was any admissible evidence presented that Robinson ordered the tying up or murder of the Hills. Major Ogden's statements supporting such a conclusion were deemed inadmissable by the Arizona Supreme Court. Although there was evidence that a year earlier Robinson had entered Susan's sister's house in search of Susan after two of Robinson's associates had first entered the house with guns and tied up Susan's sister and niece, Robinson did not harm anyone on that occasion and there was no evidence that Robinson had instructed his associates to tie up Susan's sister and niece. Hence, the total evidence here at most indicates that Robinson formulated and initiated a plan to have Mathers and Washington invade the Hills' home to locate Susan or

drugs, not any plan to bind and murder the Hills.

The Arizona Supreme Court's findings on appeal reflect the lack of evidence of Robinson's presence at or ordering of the murder. While it found Washington "was at least present in the Hills' home" when the murder occurred, it found only that Robinson "loaded firearms into his vehicle in preparation for the trip" and "masterminded the trip." *Robinson,* 796 P.2d at 864. [FN15] The court, however, did not make any specific finding that Robinson ordered the binding or killing of the Hills. Despite the lack of findings on these critical points, the court relied on the specific manner in which Sterleen's murder was carried out to uphold the especially cruel and heinous or depraved aggravating factor. This was an arbitrary application of state law.

FN15. We note that, although the jury found Robinson guilty of first degree murder, attempted first degree murder, burglary in the first degree, armed robbery, aggravated assault causing serious physical injury, and aggravated assault using a deadly weapon, this verdict did not require the jury to find that Robinson entered the Hills' home. The jury was instructed both as to felony murder and accomplice liability and found both Mathers and Washington guilty of the same offenses. Either a felony murder or accomplice theory allowed the jury to impute guilt to Robinson through the actions of Mathers and Washington.

"There is no vicarious liability for cruelty in capital cases absent a plan intended or reasonably certain to cause suffering. The plan must be such that suffering before death must be inherently and reasonably

certain to occur, not just an untoward event." *Carlson*, 48 P.3d at 1193. To apply "[m]ere foreseeability as a benchmark for death in capital cases would not permit the aggravators to serve their constitutional purpose of narrowing the class of first-degree murderers who can be sentenced to death." *Id.* at 1192.[FN16] In holding that Sterleen's murder was proved beyond a reasonable doubt to be especially cruel, the Arizona Supreme Court relied on the evidence that Sterleen was bound and witnessed the shooting of her husband prior to her murder, causing her mental suffering. *Robinson*, 796 P.2d at 863. As there was no evidence and the court made no finding that Robinson was present at the time of the murder, to support a cruelty finding the court was required to address whether Robinson in any way intended or anticipated the manner of Sterleen's murder.[FN17] The court did not even address foreseeability.[FN18] This failure to apply a constitutionally necessary narrowing principle of state law in applying an aggravating factor is clearly arbitrary, and so a violation of the Eighth Amendment.

FN16. While the Arizona Supreme Court decision in *Carlson* clarifying the degree of foreseeability necessary to impute cruelty to a defendant was not announced until after Robinson's sentence became final, as a substantive rule it applies retroactively to Robinson's petition. *See State v. Towery*, 204 Ariz. 386, 64 P.3d 828, 831 (2003).

FN17. We agree with the dissent that Robinson's absence "does not give him a pass on culpability," *post* at 1116, but it does require that there be evidence that he intended or anticipated not only the murder but the

manner of the murder before the "cruelty" prong may be applied. Thus, in *State v. Dickens,* cited by the dissent, the defendant, though absent, told the gunman by walkie-talkie that he should leave no witnesses, knowing full well his accomplice would murder the witnesses brutally. 187 Ariz. 1, 926 P.2d 468, 474-75, 491-92 (1996). Here there was no evidence that even intimates that kind of intent or direction.

FN18. The Arizona Supreme Court did find, in dismissing Robinson's *Edmund/ Tison* claim not on appeal before us, that Robinson acted with "reckless indifference to human life." *Robinson,* 796 P.2d at 864. This finding does not address the inquiry we are concerned with here: whether Robinson acted with a reasonable certainty that Sterleen Hill specifically would be murdered in an especially cruel manner. The fact that Robinson acted with a reckless indifference to human life generally does not tell us whether his actions had a reasonable certainty of causing Sterleen Hill's murder to occur and occur in the manner it did.

Had the Arizona Supreme Court addressed foreseeability, it could not have rationally found Sterleen's death, let alone its manner, foreseeable with reasonable certainty under state law. The Arizona Supreme Court's decision in *State v. Carlson,* which similarly involved a murder committed by accomplices outside of the presence of the defendant, wholly precludes any rational factfinder from imputing the manner of Sterleen's murder to Robinson. Unlike the evidence before us here, the evidence in *Carlson* made clear that the defendant ordered the killing of the victim by two accomplices whom she drove and let in to

the victim's apartment. *Carlson,* 48 P.3d at 1185. Once in the apartment, one of the accomplices stabbed the victim multiple times with his eyes closed. *Id.* The court nonetheless held that "cruelty was not properly found" because the defendant "did not plan how the murder would be committed and could not have known that Dan would bungle it by closing his eyes while he repeatedly stabbed Lynne." *Id.* at 1193. As in *Carlson,* there is no admissible evidence that Robinson was present at the murder or planned for the manner of the murder's execution. Indeed, there is no evidence Robinson planned that the murder be committed at all. Furthermore, as in *Carlson,* there is no basis to conclude that Robinson's home-invasion plan was reasonably *certain* to cause death, let alone death following suffering. Robinson could not have foreseen with any certainty that his accomplices would "bungle" the home invasion and murder Sterleen in the manner they did. The Arizona Supreme Court made no finding to that effect. The murder here, like that in *Carlson,* is a near-textbook example of the type of unforeseen event that Arizona courts may not constitutionally rely on to support a finding of cruelty. We hold that the Arizona Supreme Court here acted arbitrarily.

We also hold that Robinson's lack of personal participation in the murder renders the sentencing court's application of the heinous or depraved factor arbitrary. Unlike cruelty, a finding of heinousness or depravity depends on the defendant's state of mind. *See Martinez-Villareal v. Lewis,* 80 F.3d 1301, 1308 (9th Cir.1996); *State v. Newell,* 212 Ariz. 389, 132 P.3d 833, 849 (2006); *State v. Moody,* 208 Ariz. 424, 94 P.3d 1119, 1167 (2004); *Carlson,* 48 P.3d at 1191. "The court

looks to a defendant's words and actions at or near the time of the offense to determine a defendant's state of mind" for purposes of finding heinousness and depravity. *State v. Murdaugh,* 209 Ariz. 19, 97 P.3d 844, 856 (2004).[FN19] The Arizona courts have typically relied on five factors "to establish a heinous and depraved state of mind": "(1) relishing the killing, (2) commission of gratuitous violence, (3) mutilation of the victim, (4) senselessness of the killing, and (5) helplessness of the victim." *Carlson,* 48 P.3d at 1193-94 (citing *Gretzler,* 659 P.2d at 11-12); *see also, e.g., State v. Detrich,* 188 Ariz. 57, 932 P.2d 1328, 1339 (1997).

FN19. The Arizona Supreme Court has alternately defined heinousness and depravity as focusing on the state of mind of the "killer," *see, e.g., Arizona v. Djerf,* 191 Ariz. 583, 959 P.2d 1274, 1287 (1998), "murderer," *see, e.g., State v. Lopez,* 174 Ariz. 131, 847 P.2d 1078, 1091 (1992); or "perpetrator," *see, e.g., State v. Bocharski,* 218 Ariz. 476, 189 P.3d 403, 420 (2008), rather than the "defendant" specifically. However, it has used these terms exclusively as an alternate means to identify the defendant, rather than to denote that heinousness and depravity can be found on the basis of the state of mind of an accomplice.

The Arizona Supreme Court upheld the sentencing court's finding of depravity as to Robinson on the basis that the killing was senseless and that Sterleen was rendered helpless prior to her death. *Robinson,* 796 P.2d at 863. The court stated simply that "the gangland-style action of forcing two elderly persons to lay [sic] face down on the floor, tying them up, then senselessly shooting them amounts to depraved

conduct." *Id.* We note initially that "senselessness and helplessness will ordinarily not be sufficient to prove heinousness or depravity." *State v. Ross,* 180 Ariz. 598, 886 P.2d 1354, 1363 (1994). The Arizona Supreme Court's reliance solely on the two least probative of the *Gretzler* factors does not, however, conclusively render their finding arbitrary. Rather, our conclusion of arbitrariness derives from the court's total failure, again, to address the lack of evidence that Robinson was present for or ordered the killing of Sterleen. The court offers no explanation for how events that Robinson had no role in can illuminate his state of mind at the time they occurred.

Unsurprisingly, we have located no decision of the Arizona Supreme Court prior to or following its decision in this case in which a finding of a heinous or depraved state of mind was based on the manner of a killing that a defendant did not participate in or direct. The Arizona Supreme Court has generally been unwilling to impute heinousness and depravity to a defendant based on the actions of an accomplice. *See State v. Richmond,* 180 Ariz. 573, 886 P.2d 1329, 1335 (1994) (refusing to find defendant possessed a heinous or depraved state of mind based on the driving of a vehicle over the body of the victim because "the evidence has never been clear regarding who drove the vehicle over the victim"), *abrogated on other grounds by State v. Mata,* 185 Ariz. 319, 916 P.2d 1035, 1039 (1996); *State v. Bracy,* 145 Ariz. 520, 703 P.2d 464, 482 n. 8 (1985) (finding that heinousness and depravity could not be shown "by one of the killer's statements immediately before the killings" because "[i]t was never proven which of the three murderers made this

statement, and we cannot impute vileness on all three men because of the statement of one of them"). We also have implicitly recognized that the manner of a person's murder not performed or intended by a defendant is an "invalid consideration [ ]" in finding depravity. *Correll v. Stewart,* 137 F.3d 1404, 1420 (9th Cir.1998). In the majority of the few cases in which the Arizona Supreme Court has been willing to impute heinousness or depravity to a defendant who did not personally kill a victim, it has made specific findings regarding the defendant's presence at and intention to assist the killing. *See State v. Anderson,* 210 Ariz. 327, 111 P.3d 369, 395-96 (2005); *State v. Cook,* 170 Ariz. 40, 821 P.2d 731, 751-52 (1991); *State v. Correll,* 148 Ariz. 468, 715 P.2d 721, 730-33 (1986); *State v. Tison,* 129 Ariz. 526, 633 P.2d 335, 352-353 (1981). In the cases in which it has considered, but ultimately rejected a finding of heinousness or depravity as to a defendant who did not personally kill the victim, the Arizona Supreme Court has focused its analysis exclusively on aspects of the killing within the defendant's knowledge and control. *See Carlson,* 48 P.3d at 1193-94 (focusing on medical condition of victim chosen by defendant); *State v. Miles,* 186 Ariz. 10, 918 P.2d 1028, 1030 (1996) (focusing on defendant's purpose in having defendant killed and defendant's participation in rendering victim helpless).

We have located only two cases aside from *Robinson* in which the Arizona Supreme Court has found heinousness and depravity as to a defendant who was not present at the time of the killing. The court's analysis in those cases is instructive as to the arbitrariness of the court's conclusions here. In *State v.*

Speer, 221 Ariz. 449, 212 P.3d 787, 791-92 (2009), the defendant, while imprisoned, had an accomplice murder the victim because the victim was a potential witness against the defendant. The court applied the especially heinous, depraved, or cruel aggravating factor purely on the basis of the witness elimination motive. *Id.* at 802. In *State v. Milke*, 177 Ariz. 118, 865 P.2d 779, 781-82 (1993), the defendant delivered her four year old son to two accomplices who murdered him at her request. The court found the defendant possessed a heinous and depraved state of mind on the basis of three factors: 1) the senselessness of the *defendant's desire* to have her son killed; 2) the helplessness of her son *at the time she delivered him to his ultimate killers*; 3) and her parental relationship with the victim. *Id.* at 785-86. Each of these aspects of the murder related directly to the defendant's identity and her personal choices and actions. In both cases the defendant ordered the murder, so that a fact-based inquiry into the defendant's state of mind concerning the murder could occur. And at no point in either case did the court rely on or even discuss the actual manner in which the defendants' accomplices murdered their victims, instead focusing on the defendants' own actions. This focus was presumably because the court realized the irrelevance of events occurring outside of the defendants' presence or control to understanding their states of mind. The court's failure here to recognize either the defendant's lack of any contemporaneous state of mind about a murder he did not order or participate in, or the irrelevance of the manner of the murder in determining Robinson's state of mind, makes its holding arbitrary in violation of the Eighth Amendment.

B. Claim 8: Ineffective Assistance of Counsel

A defendant's Sixth Amendment right to counsel in a criminal trial includes "the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). The right attaches at both the guilt and sentencing phases. *Silva v. Woodford*, 279 F.3d 825, 836 (9th Cir.2002). To prevail on his claim of ineffective assistance of counsel at sentencing, Robinson must demonstrate that "the performance of his counsel fell below an objective standard of reasonableness at sentencing and ... that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Correll*, 539 F.3d at 942 (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). We hold that Robinson has met his burden to demonstrate that he received ineffective assistance of counsel.

1. Deficient Performance

Under *Strickland* we presume that counsel was competent. *Duncan v. Ornoski*, 528 F.3d 1222, 1234 (9th Cir.2008), *cert. denied*, *Duncan v. Ayers*, ... U.S. ..., 129 S.Ct. 1614, 173 L.Ed.2d 1001 (2009). Robinson can "rebut this presumption by showing that [counsel's] performance was objectively unreasonable under prevailing professional norms and was not the product of sound strategy." *Id.* (citing *Strickland*, 466 U.S. at 688-89, 104 S.Ct. 2052). At the time Robinson was sentenced, prevailing professional norms imposed

a duty on counsel to adequately investigate, develop, and present mitigating evidence in capital sentencing proceedings. *See Summerlin,* 427 F.3d at 630; *Ainsworth v. Woodford,* 268 F.3d 868, 877 (9th Cir.2001) ("[Investigation] was as crucial in 1980 as it is today in order to assure individualized sentencing and the defendant's right to a fair and reliable capital penalty proceeding."); ABA Standards for Criminal Justice 4-4.1 (2d ed. 1980) ("It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the penalty [phase]."); *see also Strickland,* 466 U.S. at 690-91, 104 S.Ct. 2052.

In preparing for the penalty phase of a capital trial, defense counsel has a duty to "conduct a thorough investigation of the defendant's background" in order to discover all relevant mitigating evidence. *Correll,* 539 F.3d at 942 (quoting *Williams v. Taylor,* 529 U.S. 362, 396, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)); *see also Williams,* 529 U.S. at 415, 120 S.Ct. 1495 (O'Connor, J., concurring) (counsel has a duty to make a "diligent investigation into his client's troubling background and unique personal circumstances"). Certain forms of investigation are fundamental to preparing for virtually every capital sentencing proceeding. At the very least, counsel should obtain readily available documentary evidence such as school, employment, and medical records, *see Ainsworth v. Woodford,* 268 F.3d 868, 877 (9th Cir.2001) (concluding that counsel was ineffective because he failed to obtain relevant records), and obtain information about the defendant's character and background, *see Boyde v. California,* 494 U.S. 370, 382, 110 S.Ct. 1190, 108

L.Ed.2d 316 (1990) ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." (internal quotation and citation omitted)). The investigation should also "include inquiries into social background and evidence of family abuse." *Summerlin*, 427 F.3d at 630 (citing *Boyde v. Brown*, 404 F.3d 1159, 1176 (9th Cir.2005)). Counsel also has a "duty to investigate and present mitigating evidence of mental impairment, which includes examination of mental health records." *Lambright*, 490 F.3d at 1117 (quoting *Summerlin*, 427 F.3d at 630) (internal edits and quotation marks omitted). Although counsel will typically begin the investigation by interviewing the defendant, the investigation cannot end there unless the "defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful." *Strickland*, 466 U.S. at 691, 104 S.Ct. 2052.

In *Smith v. Stewart*, 140 F.3d 1263 (9th Cir.1998), counsel "did not perform any real investigation into mitigating circumstances, even though that evidence was rather near the surface," and gave no tactical reasons for his failure to do so. *Id.* at 1269. At a post-conviction hearing, Smith's counsel testified that he had spoken generally with Smith and with Smith's mother but said that he had received no information that would help with a mitigation defense. *Id.* We found that "the record ... indicates that counsel asked nothing more than a few generalized questions and

conducted none of the real probing for information that legal praxis assumes and even demands." *Id.* We noted that counsel could have pointed to Smith's sociopathic personality, drug history, his "fine set of family relationships," and his love and support for his children. *Id.* Because we found no justification for counsel's failure to develop this mitigation evidence, we held that counsel's performance was ineffective. *Id.*

Here, as in *Smith*, Robinson's trial counsel engaged in virtually no investigation and presented very little argument at the sentencing phase of the trial. Robinson's trial counsel's strategy at the sentencing phase was to focus on the state's failure to prove aggravating circumstances. His sentencing memorandum addressed only two statutory mitigating circumstances-Robinson's minor role in the murder, and the fact that the killing was not foreseeable-and no nonstatutory mitigating circumstances. At the sentencing hearing, counsel did not call a single witness or introduce any evidence. Although Roberson said at argument that he could "cite a whole lot of mitigating factors as far as Fred is concerned," he only briefly discussed two nonstatutory circumstances: that Robinson did not have a history of harming people and that he was "apparently" a good father. The entirety of Roberson's oral argument at the penalty phase consisted of ten pages of double-spaced transcript.

Roberson conducted no investigation of Robinson's family history; he did not speak with any member of Robinson's family; he did not request school, medical, or employment records; and he did not request a mental health evaluation. By his own admission,

Roberson limited his preparation to interviewing Robinson and asking him whether there were any witnesses that should be presented. It is not clear from the record how many times they met or for how long,[FN20] but it is clear that counsel did not ask any probing questions that would likely have led to the discovery of mitigating evidence. *See Smith,* 140 F.3d at 1269. Additionally, although counsel said he asked Robinson about potential trial witnesses, he did not say that he informed Robinson about what would constitute mitigating evidence to enable Robinson to assist effectively in the investigation.

FN20. Roberson's personal time sheets and the time sheets he filed with the court had been shredded before the evidentiary hearing.

Roberson attempted to justify his failure to interview Robinson's family members by explaining that he thought it would be futile because some of Robinson's family members had testified against him during the guilt phrase of the trial. This decision was not one a reasonably competent attorney would have made. Robinson had fifteen children, only two of whom had testified against him. According to counsel, Robinson was a good father, making it likely that at least some of them would have been willing to testify on his behalf. He also had a wife, ex-wife, parents, and seventeen siblings who not only could have testified on Robinson's behalf, but also could have provided important background information about Robinson's childhood, providing leads for further investigation. We can find no reason for counsel to believe that interviewing these family members would be fruitless.

Counsel also failed to explore readily available sources of mitigating evidence concerning Robinson's potential for rehabilitation. If counsel had spoken with prison guards, they would have informed him that Robinson was a model prisoner. Robinson's good behavior has continued while he has been on death row; he gets along well with his fellow inmates, he is visited often by family members, goes to church regularly, and is classified as Level Five-One, the lowest security level possible for a death row inmate. A psychological evaluation of Robinson would have confirmed that he did not have a hostile or aggressive personality, but rather was generally helpful and easy going, and thus demonstrated a potential for rehabilitation and a low risk of future dangerousness. Counsel did not provide any tactical explanation for not presenting evidence of Robinson's potential for rehabilitation. There was no reason not to present such evidence, as this was not a situation where introducing character evidence would have opened the door for the prosecution to introduce negative character evidence. Counsel's decision to forgo any investigation into Robinson's potential for rehabilitation, even though such evidence was close at hand, was not strategic and fell below prevailing professional norms at that time.

Had Roberson conducted an effective penalty-phase investigation, he would have learned of aspects of Robinson's character and background that would have provided classic mitigation evidence at sentencing, including: Robinson's impoverished background; his unstable and often abusive upbringing; his multiple episodes of childhood sexual abuse; his low

intelligence; his personality disorder; his non-violent nature; and his potential for rehabilitation[FN21] Instead, counsel's limited investigation yielded almost nothing of use. Accordingly, we conclude that Roberson's performance was deficient.

FN21. The dissent argues that Roberson's failure to discover this evidence does not constitute deficient performance in light of the Supreme Court's recent decisions in *Bobby v. Van Hook,* --- U.S. ----, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009), and *Wong v. Belmontes,* --- U.S. ----, 130 S.Ct. 383, --- L.Ed.2d ---- (2009). But in each of those cases, defense counsel presented a significant amount of mitigating evidence, including evidence of the kind Roberson failed to present here. *See Bobby,* 130 S.Ct. at 18; *Wong,* 130 S.Ct. at 387. Rather, this case is closely similar to *Porter v. McCollum,* --- U.S. ----, 130 S.Ct. 447, ---L.Ed.2d ---- (2009), where the Court found deficient performance where defense counsel failed to subpoena school, medical, or military service records or interview any members of the defendant's family, and as a result did not learn of his abusive childhood, military service, substance abuse, and impaired mental health. *Id.* at 452-53.

2. **Prejudice**

Prejudice in a capital sentencing proceeding is measured by "reweigh[ing] the evidence in aggravation against the totality of available mitigating evidence." *Wiggins,* 539 U.S. at 534, 123 S.Ct. 2527. Robinson can establish that he was prejudiced by showing that "there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052. A reasonable probability is "less than the preponderance more-likely-than-not standard." *Summerlin,* 427 F.3d at 643. Rather, it "is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052. If there is a reasonable probability that the sentencing judge would not have imposed death if he was aware of the mitigating circumstances, petitioner has been prejudiced and is entitled to relief. *Summerlin,* 427 F.3d at 643 (citing *Wiggins,* 539 U.S. at 537, 123 S.Ct. 2527). "[I]t is not necessary for the habeas petitioner to demonstrate that the newly presented mitigation evidence would necessarily overcome the aggravating circumstances." *Correll,* 539 F.3d at 951-52 (citing *Williams,* 529 U.S. at 398, 120 S.Ct. 1495).

At the time Robinson was sentenced, Arizona's death penalty statute required a judge to impose the death penalty if one or more aggravating circumstances were proved beyond a reasonable doubt and if the mitigation established by a preponderance of the evidence was not sufficiently substantial to justify leniency. Ariz.Rev.Stat. § 13-703(E) (1988) (current version at Ariz.Rev.Stat. § 13-751). Thus, at that time, "failure to present a mitigation defense all but assured the imposition of a death sentence under Arizona law." *Summerlin,* 427 F.3d at 640. In *Summerlin,* the sentencing court found that two aggravating circumstances applied to the defendant: the defendant had a prior felony conviction and committed the murder in an especially cruel, heinous, or depraved manner. *Id.* at 641. Because defendant's counsel

presented no mitigating evidence, the court was bound under Arizona law to impose the death sentence. *Id.* at 640. We concluded "that the failure of trial counsel to investigate, develop, and present mitigating evidence at the penalty phase hearing has undermined our confidence in the sentence of death imposed by the trial judge" because, "[h]ad an adequate mitigation strategy been presented, there is a 'reasonable probability' that an objective sentencing factfinder 'would have struck a different balance.' " *Id.* at 643 (quoting *Wiggins*, 539 U.S. at 537, 123 S.Ct. 2527).

The state argues, and the district court held, that Robinson was not prejudiced because Robinson failed to establish a causal connection between the mitigating evidence and the crime. The district court found: (1) that there was no evidence that Robinson's ability to conform his conduct to the law or to know the difference between right and wrong were significantly impaired; (2) that Robinson "did not establish a causal connection between [his impoverished childhood, sexual abuse, and unfair treatment] and his offense-related conduct;" and (3) that there was no connection between his "substandard education, low average intelligence, diabetes, and physical disability" and the crime. The district court concluded that even if this evidence had been presented at sentencing, it "would have been accorded little mitigating weight" and could not outweigh the two aggravating factors. Thus, it was "not reasonably probable" that the proffered evidence would have undermined confidence in the outcome of the sentencing hearing.

The district court's holding is contrary to Ninth Circuit

and Supreme Court precedent. The Supreme Court has expressly rejected the requirement that a defendant establish an explanatory nexus between the proffered mitigating evidence and the crime. *See Smith v. Texas,* 543 U.S. 37, 45, 125 S.Ct. 400, 160 L.Ed.2d 303 (2004) (holding that evidence of a troubled childhood and limited mental abilities is relevant for mitigation purposes). We explained the reasoning behind rejecting a nexus requirement as follows:

> If evidence relating to life circumstances with no causal relationship to the crime were to be eliminated, significant aspects of a defendant's disadvantaged background, emotional and mental problems, and adverse history, as well as his positive character traits, would not be considered, even though some of these factors, both positive and negative, might cause a sentencer to determine that a life sentence, rather than death at the hands of the state, is the appropriate punishment for the particular defendant. This is simply unacceptable in any capital sentencing proceeding, given that "treating each defendant in a capital case with that degree of respect due the uniqueness of the individual," and determining whether or not he is deserving of execution only after taking his unique life circumstances, disabilities, and traits into account, is constitutionally required.

Lambright, 490 F.3d at 1115 (quoting *Lockett v. Ohio,* 438 U.S. 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)). Moreover, "whether counsel's failure to present evidence related to antisocial personality disorder and long-term drug use was prejudicial did not turn on 'whether those precluded [the defendant] from knowing

right from wrong....' " *Id.* (quoting *Smith,* 140 F.3d at 1271). Thus, the district court erred when it relied on Robinson's failure to demonstrate a causal connection between the evidence and the crime as its basis for assigning the evidence minimal mitigating weight.

The state also argues that it was not reasonably likely that the sentencing judge would have rendered a different decision if the mitigating evidence had been presented because the Arizona court already determined in the post-conviction proceedings that the additional evidence was not sufficient to warrant leniency. First, the state court, like the district court, erroneously imposed a requirement that Robinson prove a causal connection between the mitigation evidence and the crime. It, therefore, improperly rejected or under-weighted valid mitigating evidence. Compounding this problem, the state court weighed the proffered evidence against two statutory aggravating circumstances: especially cruel, heinous, or depraved conduct and procuring the commission of the offense by a promise of something of pecuniary value. We have held above, however, that the state court arbitrarily applied the aggravating circumstance of especially cruel, heinous, or depraved conduct to Robinson. Our confidence in the court's imposition of the death sentence has been undermined because, had the sentencing judge properly evaluated the mitigating evidence offered in the evidentiary hearing and weighed it against the single aggravating circumstance of procuring the offense by a promise of something of pecuniary value, there is a reasonable probability that the court would have imposed a sentence other than death. We conclude that Robinson has established that

he was prejudiced by counsel's ineffective assistance.

In sum, Roberson's failure to conduct a thorough investigation of potential mitigating evidence and to present an adequate mitigation strategy fell below reasonable standards of professional conduct for attorneys representing defendants at a capital sentencing. Robinson was prejudiced by counsel's ineffective assistance because it was reasonably likely that the outcome of sentencing would have been different had the state court considered the mitigating evidence in the proper light against the single surviving aggravating circumstance. We hold therefore that the district court erred in finding that Robinson did not receive ineffective assistance of counsel.

IV. Conclusion

The district court erred when it held that Robinson's claim challenging the application of the especially cruel, heinous, or depraved conduct aggravating circumstance was procedurally barred. On the merits, we hold that the state court arbitrarily and capriciously applied the especially cruel, heinous, or depraved conduct aggravating circumstance to Robinson. We also hold that Robinson received ineffective assistance of counsel in the penalty phase. We conclude that Robinson is entitled to relief in the form of a new penalty phase trial. We reverse the district court's denial of a writ of habeas corpus as to the penalty phase and remand with instructions to grant the writ of habeas corpus unless the state court undertakes resentencing proceedings within a reasonable time to be determined by the district court.

REVERSED and **REMANDED** for issuance of a conditional writ of habeas corpus.

RAWLINSON, Circuit Judge, dissenting:

I respectfully dissent. The record in this case supports the district court's determination that Fred Robinson's claim challenging application of the cruelty prong of the "cruel, heinous and depraved" aggravating factors under Arizona's death penalty statute is procedurally barred. Although a closer question is presented by application of the heinous/depraved prongs of the statutory aggravating factors, the Arizona state courts did not act arbitrarily and capriciously in applying the heinous/depraved prongs of the statutory aggravating factors when considering the facts underlying the murder of the elderly victim. *See Styers v. Schriro*, 547 F.3d 1026, 1033 (9th Cir.2008) ("A state court's finding of an aggravating circumstance in a particular case-including a de novo finding by an appellate court that a particular offense is especially heinous or depraved-is arbitrary or capricious if and only if no reasonable sentencer could have so concluded.") (citation, alterations, and internal quotation marks omitted). Finally, as recently reiterated by the United States Supreme Court, any failure by defense counsel to present additional mitigation evidence did not prejudice Robinson.

As a preliminary matter, I note that even if the heinous/depraved prongs of the statutory aggravating factors were arbitrarily applied in determining the sentence to be imposed, Robinson's procedural default of his claim involving the cruelty prong of the statutory

aggravating factors would be sufficient to sustain imposition of the death penalty. *See State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1, 10 (1983). Therefore, I first examine the question of procedural default of the claim involving application of the cruelty prong of the statutory aggravating factors.

To avoid application of the procedural bar to his claim challenging application of the cruelty prong of the statutory aggravating factors, Robinson was required to "present[ ] the *factual and legal* basis for his claim[ ] to the state courts ..." *Moormann v. Schriro*, 426 F.3d 1044, 1056 (9th Cir.2005) (emphasis added).

Before the Arizona Supreme Court, Robinson argued generally that "imposition of the death penalty was in violation of the statute and of the Constitution of the United States." We have not deemed a conclusory argument such as this sufficient presentation of a claim to avoid a procedural bar. *See Insyxiengmay v. Morgan*, 403 F.3d 657, 668 (9th Cir.2005) ("In this circuit, the petitioner must make the federal basis of the claim explicit either by specifying particular provisions of the federal Constitution or statutes, or by citing to federal case law."). Indeed, Robinson's specific argument regarding the cruelty prong of the statutory aggravating factors stated:

Cruelty involves the infliction of pain and distress on the victims. The State must show by evidence that the victims *actually* suffered physical or mental pain prior to the death. Cruelty is not shown if the evidence is inconclusive. The State produced *no* evidence to show that the victim actually suffered pain or distress to the

extent necessary to make this finding. Mr. Hill testified that he was not aware of what actually occurred because he was knocked out, not shot. Mrs. Hill's last words, as heard by Mr. Hill, concerned a desire that her feet be covered up, not a plea for mercy or an expression of fear that she was about to be killed. There is no concrete evidence to support the State's theory that Mr. Hill was shot first but even if he was, Mrs. Hill was shot almost immediately thereafter without waiting a long time to be shot.

(Emphasis in the original) (citations omitted). The Arizona Supreme Court addressed the cruelty factor in the context presented by Robinson. *See State v. Robinson*, 165 Ariz. 51, 796 P.2d 853, 862-63 (1990).

However, in his amended habeas petition, Robinson completely shifted his argument regarding the cruelty prong. There, Robinson asserted:

In Robinson's case, evidence arguably existed from which to conclude that Mrs. Hill suffered, thereby putting at issue the applicability of the 'cruelty' factor to the defendants ... Significantly, neither Judge Bradshaw nor the Arizona Supreme Court made any finding that Robinson either "intended" or "reasonably foresaw" that Mrs. Hill would suffer as a result of Robinson's actions. The evidence presented at trial or sentencing was that Robinson was not in the house at the time of the murder. No evidence was introduced at trial and sentencing, excluding the hearsay statements from Washington that were later disallowed, that Robinson had any knowledge that a murder would even take place ...

(Citations omitted).[FN1]

FN1. Acceptance of Robinson's argument could minimize the importance of exhaustion in the habeas context. A habeas petitioner could present one argument to the state courts, and, once that argument is rejected, the petitioner could strategically shift to a new argument in her or his federal habeas petition. This is reflected by Robinson's contradictory arguments before the state court ("The State produced *no* evidence to show that the victim actually suffered pain or distress to the extent necessary to make this finding.") (emphasis in the original), and in his habeas petition ("In Robinson's case, evidence arguably existed from which to conclude that Mrs. Hill suffered ...").

The majority characterizes the variant argument in the federal habeas petition as a more detailed theory than the one Robinson presented to the Arizona Supreme Court. *See* Majority Opinion, p. 1102. However, the theory presented in the federal habeas petition was markedly different than the theory presented before the Arizona state courts. In the Arizona state courts, Robinson argued that the cruelty prong of the statutory aggravating factors was inapplicable because there was no evidence that the victim actually suffered significant pain or distress. In his federal habeas petition, Robinson argued that the cruelty prong of the statutory aggravating factors was inapplicable because there was no evidence that Robinson intended or reasonably foresaw that the victim would suffer. In the state court, Robinson's argument focused on the victim's pain (or lack thereof).

In the federal court, Robinson's argument focused on his intent to cause the victim pain (or his lack of intent). It is more accurate to say that Robinson presented a different theory in federal court than to say that he presented a more detailed theory in federal court. More to the point, the different theory argued in federal court was never presented to the state courts and is now procedurally barred. *See Moormann*, 426 F.3d at 1056 (requiring presentation of the factual and legal bases of the petitioner's claim to the state courts).

Robinson's citation to *Jeffers v. Ricketts*, 832 F.2d 476 (9th Cir.1987), *rev'd sub nom. Lewis v. Jeffers*, 497 U.S. 764, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990), is singularly unpersuasive. In fact, Robinson's citation to *Jeffers* underscores his emphasis in state court on the asserted lack of pain to the victim. Immediately after the citation to *Jeffers*, Robinson argued that: "An especially cruel murder involves the senseless or sadistic infliction of great pain. That is not present in this case and, therefore, the sentence must be supported by heinous and depraved ..." (Citation omitted). Absolutely no mention was made of Robinson's lack of intent to cause pain when discussing the cruelty prong of the statutory aggravating factors. More importantly, Robinson's reference to the fact that he was not inside the residence was made in conjunction with his discussion of the heinous prong of the statutory aggravating factors, not as part of his challenge to application of the cruelty prong of the statutory aggravating factors. Fairly read, Robinson's brief to the Arizona Supreme Court simply did not raise the issue he now argues, i.e., whether the evidence adequately established that Robinson had the

intent to inflict pain upon the victim, or reasonably foresaw that the victim would suffer pain. For that reason, I would hold that Robinson's challenge to the cruelty prong of the statutory aggravating factors is foreclosed.

Because the existence of facts supporting application of the cruelty prong of the statutory aggravating factors would be adequate to sustain the death sentence imposed, I would end my analysis of Robinson's sentencing challenge with that conclusion. However, because my colleagues in the majority have also concluded that the state court's finding that the victim was killed in a heinous/depraved manner was arbitrary, I will comment briefly on that point.

I note initially that Robinson's absence from the interior of the residence does not give him a pass on culpability for the murder of the elderly victim. *See State v. Dickens*, 187 Ariz. 1, 926 P.2d 468, 491-92 (1996) (in banc); *see also State v. Nichols*, 219 Ariz. 170, 195 P.3d 207, 213 (Ct.App.2008). ("[E]vidence that a defendant was not present at a crime scene is not, as a matter of law, directly contrary to or inconsistent with a guilty verdict.") (citation omitted).

We should also keep in mind that "[f]ederal habeas review of a state court's application of aggravating factors is limited to determining whether the state court's finding was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation." *Moormann*, 426 F.3d at 1053 (9th Cir.2005) (citation and internal quotation marks omitted). "We examine whether, viewing the evidence

in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (citation and internal quotation marks omitted). When viewed through this prism rather than through the lens of a post-hoc factfinder, Robinson's claim fails.

Although the Arizona case of *State v. Carlson*, 202 Ariz. 570, 48 P.3d 1180 (2002) (in banc) makes this a closer case on the merits, I remain of the view that the facts support application of the heinous/depraved prongs of the statutory aggravating factors, especially when one considers that the same court that decided *Carlson* rejected Robinson's challenge to application of the heinous/depraved prongs of the statutory aggravating factors.

In *Carlson*, 48 P.3d at 1193, the Arizona Supreme Court held that "[t]he heinous and depraved portion of the [statutory aggravating factors] focuses on the defendant's state of mind at the time of the crime. However, the inquiry concentrates on the defendant's mental state as evidenced through[his] actions ..." (citations omitted).

Robinson relies on his absence from inside the residence to defeat application of the heinous/depraved prongs of the statutory aggravating factors. However, the Arizona Supreme Court did not view Robinson's absence as determinative when discussing the heinous/depraved prongs. *See Robinson*, 796 P.2d at 862. To the contrary, the Arizona Supreme Court noted that "Robinson provided the murder weapon and transported [the triggerman] to the home of his

common-law wife's parents. There is no evidence that [the triggerman] knew the [victims] or where they lived but for the guidance of Robinson." Although Robinson did not commit the actual murder, the record reflects, and the Arizona Supreme Court found, that he definitely set the murder in motion. *See id.* at 864 (noting that "Robinson masterminded the trip"). Although one could disagree with that finding, it is much more difficult to argue that the finding is arbitrary. Indeed, to the extent Robinson challenges the Arizona Supreme Court's interpretation of the meaning of the statutory aggravating factors, his challenge is unavailing. *See id.* at 863 ("As difficult as it may be to define depravity, the gangland-style action of forcing two elderly persons to lay face down on the floor, tying them up, then senselessly shooting them amounts to depraved conduct.") (citation omitted); *see also, Langford v. Day*, 110 F.3d 1380, 1389 (9th Cir.1996) ("We accept a state court's interpretation of state law, and alleged errors in the application of state law are not cognizable in federal habeas corpus ...") (citations omitted).

The evidence that a year earlier Robinson and two cohorts had entered Susan's sister's home in search of Susan, Robinson's common-law wife, is not so easily discounted. The two cohorts entered the house with guns and tied up Susan's sister and Susan's niece. Although no one was harmed, the record reflects that it was only the presence of Susan's niece that prevented a murder from occurring.

Finally, the United States Supreme Court has decided two cases just this month that, in my view, foreclose a

determination that Robinson was prejudiced by any failure of defense counsel to present additional mitigation evidence during the sentencing phase of the proceedings. In *Bobby v. Van Hook*, --- U.S. ----, 130 S.Ct. 13, 15, 175 L.Ed.2d 255 (2009), a pre-AEDPA case, *see id.* at 14, the Supreme Court considered whether Van Hook's "attorneys were ineffective during the penalty phase because they did not adequately investigate and present mitigating evidence ..." *See id.* at 16. Applying *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court ruled that Van Hook suffered no prejudice because "the minor additional [mitigation] details the trial court did not hear would [not] have made any difference." *Van Hook*, --- U.S. ----, 130 S.Ct. 13, 17, 175 L.Ed.2d 255.

Similarly, in *Wong v. Belmontes*, --- U.S. ----, 130 S.Ct. 383, ---L.Ed.2d ---- (2009), the Supreme Court found a lack of prejudice where the petitioner accused his counsel of failing to "dig deeper" for additional mitigating evidence. *See id.* at 386.

In this case, the majority lists the following "classic mitigation evidence" that defense counsel, in the majority's view should have discovered: "Robinson's impoverished background; his unstable and often abusive upbringing; his multiple episodes of childhood sexual abuse; his low intelligence; his personality disorder; his non-violent nature; and his potential for rehabilitation." Majority Opinion, p. 1110-11. However, the Supreme Court's rulings in *Van Hook* and *Wong* clarify that these asserted failings cannot support a claim under *Strickland*. Fortuitously, in this case, we

do not have to try to determine whether the asserted deficiencies would have made a difference in the sentence imposed. In this case, we know the answer because the same judge who imposed the sentence of death presided over the postconviction review proceedings. After hearing all the mitigation evidence that Williams mustered after-the-fact, the sentencing judge declined to entertain the prospect of changing the previously imposed sentence.

At the postconviction review proceedings before the sentencing judge, Williams presented testimony from Juan Gonzales, a Corrections Officer at the Florence Correctional Institution. Officer Gonzales testified favorably regarding Robinson's contact with his family and his lack of disciplinary problems. Officer Gonzales testified that Robinson had not displayed any violent tendencies, was "very easy to work with," and got along well with the other inmates, and had been classified at the lowest level of security since his incarceration. Officer Gonzales informed the court that Robinson attended church "quite often." According to Officer Gonzales, if Robinson were to be placed into the general population, "he would do well."

Dr. Tod Roy, a psychologist, testified that, in addition to conducting a clinical interview with Robinson, he administered the Minnesota Multi-Phasic Personality Inventory test, intelligence testing, the Rorschach diagnostic test and the Thematic Apperception test. Dr. Roy also reviewed Robinson's school records and the psychiatric evaluation conducted by Dr. Eva McCullars.

In addition, Dr. Roy interviewed Robinson's father. Dr. Roy opined that Robinson "had the potential to be rehabilitated"; that he had close family ties; that he had good behavior while imprisoned, noting that he "carrie[d] the lowest risk status that can be applied to anyone on death row"; and that Robinson was not dangerous or likely to re-offend.

Dr. Roy disclosed test results reflecting Robinson's low level of intelligence and educational achievement, and testified at length about Robinson's disadvantaged childhood, describing Robinson as "born into an impoverished environment of a rural nature ..." He relayed that Robinson lived in a segregated community and was once "pulled off a sidewalk by his aunt to allow a white woman to pass."

By far the most traumatic event described by Dr. Roy was Robinson's being sodomized by his mother's boyfriend when he was a child. Dr. Roy also informed the court about the heartbreak Robinson experienced when Robinson's father publicly repudiated Robinson's mother and most of Robinson's siblings during divorce proceedings. Finally, Dr. Roy testified that Robinson's aunt sexually abused him for a period of time, and that he was subjected to beatings.

After hearing all this evidence, the post-conviction review judge, who was also the sentencing judge, determined that the evidence presented would not have affected the sentence imposed.

Specifically, the post-conviction court ruled:

Mr. Robinson has been examined and found to have no mental [sic] evidence of mental disease per Dr. McCullars and an Axis II suggestion of Borderline Personality Disorder by Dr. Roy. Nothing in the record supports a suggestion that this defendant was unaware of the activities at the Hill home on the evening of the crime and the court now rejects, and would have at sentencing hearings, rejected a suggestion of Borderline Personality Disorder. This court accepts as true that Mr. Robinson has an antisocial personality disorder and is poorly adjusted to living in society, but there is nothing in his makeup now, nor in the opinion of the experts was there anything at the time of the offenses, which lessened his ability to differentiate right from wrong or to conform his actions with the law ...

The court was aware that Robinson was a model prisoner, but remained unconvinced that his model behavior translated into a potential for rehabilitation or lack of future danger to society. The court held that "to the extent any[of the claimed mitigating factors] may be, or have been present [they] certainly are/were not sufficient to affect the sentence imposed." The court explicitly discussed that although a lack of education was shown, no lack of intelligence was shown. Rather, the post-conviction court reviewed Robinson as "experienced, street smart and ... wise enough to plan carefully and act forcibly for his own well being." The court reiterated its view that "[n]one of these matters are, or have been sufficient to mitigate [Robinson's] sentence imposed."

The state post-conviction court fully considered the

mitigation evidence presented by Robinson. Its subsequent emphatic ruling that the mitigation evidence would not have affected the sentence imposed compels a conclusion of no prejudice under the rationale of *Van Hook* and *Wong*. For that reason and because Robinson's challenge to the cruelty prong of the statutory aggravating factors is procedurally barred, I respectfully dissent.

APPENDIX B

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CLERK U.S. DISTRICT COURT
DISTRICT OF ARIZONA
BY S/_____DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

FRED LAWRENCE ROBINSON, Petitioner,	) No. CIV 96-669-) PHX-RGS
vs.	)
TERRY STEWART, et al., Respondents.	) MEMORANDUM) OF DECISION) AND ORDER

Petitioner Fred Lawrence Robinson ("Petitioner") filed a Petitioner for Writ of Habeas Corpus alleging that he is imprisoned and sentenced to death in violation of the United States Constitution. The Amended Petitioner presents nine claims. This Order addresses procedural bar and other issues raised by Respondents' answer to the Petition. For the reasons set forth herein, the Court finds that the following claims are procedurally barred: 1, 2, 3, 4, and 6-A. The following claims will be addressed on the merits in a separate order: 5, 6-B, 6-C, 7, and 8. Upon Petitioner's request, Claim 9 is withdrawn.

FACTUAL BACKGROUND[1]

On the night of June 8, 1987, Ralph and Sterleen Hill were each shot at close range with a .12-gauge shotgun. Sterleen Hill died. Despite massive injuries, Ralph Hill survived. According to Mr. Hill, two men claiming to be narcotics agents had entered the Hills' home demanding money and dope. The intruders forced the Hills to lie face down on the floor of their bedroom. While one of the men stood over the couple, the other, a black man with a red bandana and a moustache, put a gun to Ralph Hill's head and then ransacked the drawers and closet. The couple's hands and feet were bound, and Mr. Hill was rendered unconscious shortly after hearing his wife request that her feet be covered up.

Not long after the shooting, Petitioner Fred Robinson, the common-law husband of Susan Hill, Ralph Hill's daughter from a previous marriage, was apprehended by police fleeing the Hills' neighborhood in a tan Chevette. Robinson and Hill had been together since 1972, parenting three children. Their relationship was stormy, as Robinson verbally and physically abused Susan. On at least three occasions, Susan had attempted to leave their Banning, California home. Each time, however, Robinson found

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[1] This is a summary of the events surrounding the crime for which Petitioner was convicted and sentenced to death. It is drawn primarily from the Arizona Supreme Court's consolidated opinion affirming Petitioner's and co-defendant Theodore Washington's convictions and sentences. See State v. Robinson, 165 Ariz. 51, 54-56, 796 P.2d 853, 856-58 (1990).

her and threatened her life if she did not return to him.

In February 1987, Susan persuaded Robinson to allow her to visit her father in Yuma, Arizona. While there, Susan informed Robinson that her stepmother had obtained a peace bond against him and that he should not enter their property. Thereafter, unbeknownst to Robinson, Susan left Yuma to visit her grandmother in California.

At trial, Robinson's son Andre testified that on the day of the Hills' shooting, he overheard Robinson, Jimmy Lee Mathers, and Theodore Washington discuss a trip to Yuma. According to Andre, Washington was wearing a red headband. Mathers told Andre that they were "going to Arizona to take care of some business," and Robinson told another son, Truman, that he was going to Arizona to look for Susan. Both Andre and Truman observed Robinson and Mathers put some guns, including a shotgun, in Robinson's tan Chevette and later drive toward Washington's house, one block away. Shortly thereafter, Truman spotted Robinson, Mathers, and Washington drive by in the vehicle, apparently on their way to Arizona.

PROCEDURAL HISTORY

On December 15, 1987, a jury convicted Petitioner Robinson and co-defendants Washington and Mathers of first degree murder, attempted first degree murder, aggravated assault (two counts), burglary, and robbery. Petitioner was sentenced to death for the murder and to various prison terms on the other counts. In a consolidated direct appeal, the Arizona

Supreme Court affirmed Petitioner's and Washington's convictions and sentences. State v. Robinson, 165 Ariz. 51, 796 P.2d 853 (1990), cert. denied, 498 U.S. 1110, 111 S. Ct. 1025 (1991). In a separate opinion issued the same day, the Arizona Supreme Court vacated Mathers's convictions and sentences based on insufficiency of the evidence. State v. Mathers, 165 Ariz. 64, 796 P.2d 866 (1990).

Petitioner filed a preliminary petition for post-conviction relief (PCR) in state court on September 18, 1991, and a supplemental petition on February 24, 1992. Six months later, the trial court issued its first ruling, finding most of the claims procedurally barred and granting an evidentiary hearing on claims relating to co-defendant Mathers's acquittal and ineffective assistance of counsel. The hearing took place on September 8-9, 1993. Additional briefing on the issues followed, and on August 12, 1994, the superior court denied relief. On April 25, 1995, the Arizona Supreme Court denied review.

Petitioner filed a Petition for Writ of Habeas Corpus in this Court on March 12, 1996, and an Amended Petition raising nine claims on May 6, 1997. Respondents filed an Answer, limited to issues of exhaustion and procedural default. Petitioner filed a Traverse, withdrawing one of his claims. Respondents then filed a Reply, and Petitioner filed a Sur-Reply.

PRINCIPLES OF EXHAUSTION AND PROCEDURAL DEFAULT

Before a federal court may review a petitioner's

claims on the merits, the petitioner must have presented in state court every claim raised in the federal habeas petition. This is referred to as the "exhaustion requirement." Coleman v. Thompson, 501 U.S. 722, 731, 111 S. Ct. 2546, 2554-55 (1991); Rose v. Lundy, 455 U.S. 509, 102 S. Ct. 1198 (1982). To properly exhaust state remedies, the petitioner must "fairly present" his claims to the state's highest court in a procedurally appropriate manner. See Castille v. Peoples, 489 U.S. 346, 351, 109 S. Ct. 1056, 1060 (1989).

A claim is "fairly presented" if the petitioner has described the operative facts and legal theories on which his claim is based. Anderson v. Harless, 459 U.S. 4, 6, 103 S. Ct. 276, 277 (1982); Picard v. Connor, 404 U.S. 270, 27-78, 92 s. Ct. 509, 513 (1971).[2] In state court, the petitioner must describe not only the operative facts but also the asserted constitutional principle. The United States Supreme Court has stated:

> If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution. If a habeas petitioner wishes to claim that an evidentiary

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[2] Resolving whether a petitioner has fairly presented his claim to the state court, thus permitting federal review, is an intrinsically federal issue which must be determined by the federal court. Wyldes v. Hundley, 69 F.3d 247, 251 (8th Cir. 1995); Harris v. Champion, 15 F.3d 1538, 1556 (10th Cir. 1994).

> ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.

Duncan v. Henry, 513 U.S. 364, 365-66, 115 S. Ct. 887, 888 (1995). Similarly, a claim may be considered unexhausted if it includes new factual allegations not presented to the state court which fundamentally alter the legal claim already considered by the state court. Vasquez v. Hillery, 474 U.S. 254, 260, 106 S. Ct. 617, 621-22 (1986).

Generally, there are two methods by which a petitioner may satisfy the exhaustion requirement. First, he may "actually" exhaust his claims by providing the state court with an opportunity to review the facts and legal theories in a procedurally appropriate manner. Second, he may "technically" exhaust his claims by showing either that a state court found his claims defaulted on procedural grounds or, if he never presented his claims in any forum, that no state remedies remain available to him. See Jackson v. Cupp, 693 F.2d 867, 869 (9th Cir. 1982) (citing Engle v. Isaac, 456 U.S. 107, 125 n.28, 102 S. Ct. 1558, 1570 n.28 (1982)). "A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him." Coleman, 501 U.S. at 732, 111 S. Ct. at 2555. If a claim has never been presented to the state court, a federal habeas court may determine whether state remedies remain available. See Harris v. Reed, 489 U.S. 255, 269-70, 109 S. Ct. 1038, 1047 (1989) (O'Connor, J., concurring);

Teague v. Lane, 489 U.S. 288, 298-99, 109 S. Ct. 1060, 1069 (1989); see also White v. Lewis, 874 F.2d 599, 602 (9th Cir. 1989).

Arizona Rule of Criminal Procedure 32 governs when petitioners may seek relief in post-conviction proceedings and raise federal constitutional challenges to their convictions or sentences in state court. Rule 32.2 provides, in part:

> a. Preclusion. A defendant shall be precluded from relief under this rule based upon any ground:
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> . . . .
>
> (2) Finally adjudicated on the merits on appeal or in any previous collateral proceeding;
>
> (3) That has been waived at trial, on appeal, or in any previous collateral proceeding.
>
> b. Exceptions. Rule 32.2(a) shall not apply to claims for relief based on Rules 32.1(d), (e), (f), and (g). When a claim under [these subsections] is raised in a successive or untimely petition, the petition must set forth the reasons for not raising the claim in the previous petition or in a timely manner. If meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner, the petition shall be summarily dismissed.

Ariz. R. Crim. P. 32.2 (as amended nunc pro tunc Sept. 24, 1992) (emphasis added). Thus, pursuant to Rule 32.2, petitioners may not be granted relief on any claim which could have been raised in a prior Rule 32 petition for post-conviction relief. Only if a claim falls within certain exceptions (sub-sections (d) through (g) of Rule 32.1) and the petitioner can justify why the claim was omitted from a prior petition will the preclusive effect of Rule 32.2 be avoided.

Therefore, in the present case, if there are claims which have not been raised previously in state court, the Court must determine whether Petitioner has state remedies currently available to him pursuant to Rule 32. If there are none, he has "technically" exhausted the claims. However, the Court may not review the claims on the merits unless Petitioner demonstrates legitimate cause and actual prejudice to excuse his failure to properly raise the claims earlier, or shows that a fundamental miscarriage of justice would result. Coleman, 501 U.S. at 735 n.1, 111 S. Ct. at 2557 n.1; Engle, 456 U.S. at 129, 102 S. Ct. at 1572. Similarly, if a claim was raised in state court but found precluded or waived, the federal court will not hear the claim absent a showing of cause and prejudice or fundamental miscarriage of justice.[3]

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[3] However, a federal court will not require a habeas petitioner to demonstrate cause and prejudice unless the procedural default is independent of the federal claim and is adequate to warrant withdrawal of federal relief See Harris, 489 U.S. at 262, 109 S. Ct. at 1043. A procedural default is not independent if, for example, the state procedural bar depends upon an antecedent determination of federal law. Harmon v. Ryan, 959 F.2d 1457, 1461 (9th Cir. 1992). Similarly, the procedural default is not (Continued)

Ordinarily "cause" to excuse a default exists if a petitioner can demonstrate that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Coleman v. Thompson, 501 U.S. 722, 753, 111 S. Ct. 2546, 2566 (1991). Objective factors which constitute cause include interference by officials which makes compliance with the state's procedural rule impracticable, a showing that the factual or legal basis for a claim was not reasonably available to counsel, and constitutionally ineffective assistance of counsel. Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645 (1986). "Prejudice" is actual harm resulting from the alleged constitutional error. Magby v. Wawrzaszek, 741 F.2d 240, 244 (9th Cir. 1984). To establish prejudice resulting from a procedural default, a habeas petitioner bears the burden of showing not merely that the errors at his trial constituted a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with errors of constitutional dimension. United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982).

(Continued).

adequate if, for example, the state courts themselves bypass the petitioner's default and consider his claims on the merits. Id. When a federal court determines that a procedural default either is not independent of federal law or is inadequate to warrant denial of federal relief, the petitioner's failure to comply with state procedures will be excused notwithstanding his failure to demonstrate cause and prejudice; in such case, the court may entertain the habeas petition. Id.

If a petitioner cannot meet the cause and prejudice standard, the Court still may bear the merits of procedurally barred claims if the failure to hear the claims would constitute a "fundamental miscarriage of justice." Sawyer v. Whitley, 505 U.S. 333, 112 S. Ct. 2514 (1992). The "fundamental miscarriage of justice" exception is also known as the "actual innocence" exception. There are two types of claims recognized under this exception: (1) that a petitioner is "innocent of the death sentence," or, in other words, that the death sentence was erroneously imposed; and (2) that a petitioner is actually innocent of the capital crime. In the first instance, the petitioner must show by clear and convincing evidence that, but for a constitutional error, no reasonable factfinder would have found the existence of any aggravating circumstance or some other condition of eligibility for the death sentence under the applicable state law. *Id.* at 336, 112 S. Ct. at 2517. In the second instance, the petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup v. Delo, 513 U.S. 298, 327, 115 S. Ct. 851, 867 (1995). To establish the requisite probability, the petitioner must show that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." Id. Furthermore:

> [A] substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare. . . . To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence–whether it be exculpatory scientific evidence, trustworthy eyewitness

> accounts, or critical physical evidence--that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.

Id. at 324, 115 S. Ct. at 865.

DISCUSSION

Claim 1: Trial/Appellate Counsel's Conflict of Interest

Petitioner asserts that his right to effective assistance of counsel at trial, sentencing, and on appeal were violated by the trial court's failure to inquire about counsel's conflict of interest or to appoint conflict-free counsel, and by counsel's actual conflict of interest. (File doc. 17 at 3-5; File doc. 18 at 11-21.)[4] He asserts a conflict existed because counsel, who represented Petitioner at trial, sentencing, and on appeal, had initially represented both Petitioner and co-defendant Mathers. (File doc. 18 at 14.) This joint representation lasted 42 days and ended when the trial court granted counsel's motion to withdraw from representing one of the defendants. (Id.)

Petitioner did not raise Claim 1 on appeal or in post-conviction proceedings. Nevertheless, Petitioner asserts that even if the claim was not specifically presented to the state's highest court, it is not

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[4] "File doc." refers to documents in this Court's file. "R.O.A." refers to documents in the state court record on appeal.

procedurally barred in federal court because the Arizona Supreme Court, on direct appeal, reviewed the entire record for fundamental error. See A.R.S. § 13-4035 (repealed 1995). Thus, Petitioner argues, Claim 1 is exhausted and ripe for review on the merits.

The Court disagrees. The Ninth Circuit has addressed the issue of Arizona's fundamental error review in the context of procedural default and stated:

> Poland next argues that the "fundamental error" review of the Arizona Supreme Court constitutes a fair presentation of an issue to that court, even if not argued by the parties nor mentioned in the court's opinion. This contention was considered and specifically rejected in Martinez-Villareal v. Lewis, 80 F.3d 1301, 1306 (9th Cir.), cert. denied, 519 U.S. 1030, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996). See also Krone v. Hotham, 181 Ariz. 364, 890 P.2d 1149, 1551 (1995) (usual rules of preclusion apply in capital cases); State v. Curtis, 185 Ariz. 112, 912 P.2d 1341 (Ct. App. 1995) (review for fundamental error of issues not raised on appeal does not enable petitioner to raise issue belatedly in post-conviction proceeding).

Poland v. Stewart, 117 F.3d 1094, 1105 (9th Cir. 1997), cert. denied, 118 S. Ct. 1533 (1998). The Court is bound by Martinez-Villareal and Poland, controlling Ninth Circuit precedent on this issue.

Furthermore, in Woratzeck v. Lewis, 863 F. Supp. 1079, 1095 (D. Ariz. 1994), aff'd, 97 F.3d 329 (9th Cir.

1996), the court rejected a petitioner's argument that Arizona's automatic direct appeal and search for fundamental error obviates the possibility that a federal constitutional claim is defaulted. The Woratzeck court also rejected the petitioner's argument that Arizona defines fundamental error as federal constitutional error. Id. Like Petitioner here, the petitioners in Woratzeck and Poland relied on Beam v. Paskett, 3 F.3d 1301 (9th Cir. 1993). However, in Beam the Ninth Circuit held:

> Idaho law establishes a mandatory review system in which the state supreme court is required to examine the record on its own initiative in order to determine whether certain specified types of errors occurred during sentencing. . . . Because the reviewing court has statutory notice of the types of errors for which it is required to examine the record, it is presumed that it has carried out its statutory obligations even when it does not expressly indicate in its opinion that it has done so. As a result, the court's affirmance of the defendant's sentence after mandatory review constitutes at least an implicit rejection of claims of error that fall within its obligatory review even if the defendant has not raised those claims with specificity. Other states have adopted mandatory review systems that differ in significant respects from Idaho's. [FN 3]
>
> [FN 3] For example, some other states have adopted procedures that may be better described as "automatic appeal" requirements rather than

> mandatory review ones. . . . [T]he content of the appeal does not appear to be prescribed by statute, and affirmance by the court does not appear to require rejection of any particular claims on the merits. A procedural default arising from a failure to present a claim pursuant to this type of appellate process would raise different issues than are presented here.

Beam, 3 F.3d at 1306 (emphasis added). In Woratzeck, the court held that Arizona is one of those other states that have review systems significantly different from Idaho's. 863 F. Supp. at 1095. Arizona's statute does not prescribe the content of the appeal, and affirmance by an Arizona appellate court does not require rejection of any particular claim on the merits.[5] The Woratzeck court noted that, brought to its logical

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[5] Arizona's statute, which pertained to appeals in general, simply stated that "[u]pon appeal taken by a defendant from the judgment, the supreme court shall review the entire record." A.R.S. § 13–4035 (repealed 1995). In contrast, Idaho has a statute specifically titled "Review of death sentences," which states:

> With regard to the sentence the court shall determine: (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and (2) Whether the evidence supports the judge's finding of a statutory aggravating circumstance from among those enumerated in section 19-2515, Idaho Code, and (3) Whether the sentence of death is excessive.

Idaho Code § 19-2827(c). See also Poland, 117 F.3d at 1105-06 (stating that the petitioner's reliance on Beam was misplaced because the Idaho statute at issue there differs significantly from Arizona's).

conclusion, the petitioner's arguments "would eliminate the utility of Arizona's procedural rules and virtually eradicate the doctrine of procedural default in Arizona." 863 F. Supp. at 1095.

The Court finds that Petitioner did not fairly present Claim 1 to the state's highest court. The Court further finds that Petitioner has no remaining state court remedies because the claim would be precluded under Rule 32.2(a)(3) if Petitioner raised it in state court now. Claim 1 will be procedurally barred unless Petitioner establishes legitimate cause and actual prejudice, or a fundamental miscarriage of justice.

Petitioner contends that his procedural default on the conflict of interest claim was caused by the conflict violation itself. (File doc. 31 at 15.) Relying on the Eighth Circuit's decision in Jamison v. Lockhart, 975 F.2d 1377 (8th Cir. 1992), Petitioner asserts that the conflict of interest operated as an external factor impacting counsel's ability to assert the conflict issue at trial or on appeal. In a corollary argument, Petitioner claims that raising the conflict issue would have required counsel to admit an ethical violation for failing to withdraw. (File doc. 31 at 16.) Petitioner thus reasons that fear of retribution for such a violation constituted an additional external factor which influenced counsel's decision not to raise Claim 1 on direct appeal.

Petitioner's reliance on Jamison is misplaced. In that case, the petitioner claimed he did not learn of counsel's actual conflict of interest until it was too late to pursue an appeal in the state courts. 975 F.2d at

1379. The crux of his cause argument was that he was prevented from discovering the conflict issue by his reliance on counsel's agreement to pursue an appeal (which was never filed). The Eighth Circuit noted that the petitioner's conflict of interest cause argument was "an extremely narrow and tenuous claim" and remanded the matter for an evidentiary hearing to determine, among other things, precisely when the petitioner became aware of the conflict. Jamison, 975 F.2d at 1379, 1380-81.

Here, Petitioner was aware from the beginning of his case that counsel had represented both he and Mathers. He thus had notice of the alleged conflict of interest. See McCleskey v. Zant, 499 U.S. 467, 499, 111 S. Ct. 1454, 1473 (1991) (no cause for failure to raise claim in first habeas petition where petitioner had prior knowledge of facts that put him on notice of claim). Furthermore, Petitioner was appointed new counsel to represent him in his post-conviction proceedings. The substance of Claim 1 could have been raised at that time, and Petitioner offers no cause to excuse this failure to do so.[6] Because Petitioner has

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[6] Although not asserted by Petitioner, the Court observes that because there is no constitutional right to assistance by post-conviction counsel, the ineffectiveness of such counsel cannot constitute cause for a procedural default. See Coleman v. Thompson, 501 U.S. 722, 755, 111 S. Ct. 2546, 2567-68 (1991) (ineffective assistance of counsel can represent sufficient cause only when it rises to the level of an independent constitutional violation); Harris v. Vasquez, 949 F.2d 1497, 1513-14 (9th Cir. 1990) (no Sixth Amendment right to counsel in post-conviction proceedings); Pennsylvania v. Finley, 481 U.S. 551, 555, 107 S. Ct. 1990, 1993 (1987) (same).

failed to establish cause for the default of Claim 1, the Court need not reach the question of prejudice. See Thomas v. Lewis, 945 F.2d 1119, 1123 n.10 (9th Cir. 1991).

Petitioner also contends that a fundamental miscarriage of justice will result if the Court does not consider his conflict claim on the merits. Asserting the impossibility of speculating what would have occurred had he been appointed conflict-free counsel, Petitioner invites the Court to conclude that a fundamental miscarriage of justice arose from the "structural defect" created by counsel's conflict of interest. Petitioner offers no support for this argument, and the Court declines the invitation to so extend the miscarriage of justice exception. Moreover, Petitioner advances no "new reliable evidence" that was not presented at trial to support his claim that he is actually innocent of the crime. See Schlup, 513 U.S. at 324, 115 S. Ct. at 865 ("To be credible, such a claim [of actual innocence] requires petitioner to support his allegations of constitutional error with new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial."). The Court finds that Petitioner has not made the requisite showing of actual innocence and that the failure to consider Claim 1 on the merits will not result in a fundamental miscarriage of justice.

Claim 2: Refusal to Instruct on a Lesser-Included Offense

In Claim 2, Petitioner alleges that his right to due process under the Fourteenth Amendment was violated by the state court's refusal to give the jury a second degree murder instruction. (File doc. 17 at 5; File doc. 18 at 21-30.) Although Petitioner raised this claim during trial, he failed to include it in his direct appeal to the Arizona Supreme Court. As discussed supra at pages 10-12, the Court rejects Petitioner's argument that the state supreme court's review for fundamental error exhausted Claim 2.

The Court finds that Petitioner would be precluded under Rule 32.2(a)(3) from raising Claim 2 in state court now. He thus has no available state remedies. As cause for the default, Petitioner asserts trial/appellate counsel's alleged conflict of interest. The Court previously rejected this argument. See discussion supra at 13-14. The Court also disagrees with Petitioner's contention that he was excused from raising the claim on appeal because to do so would have been futile. See Roberts v. Arave, 847 F.2d 528, 530 (9th Cir. 1988) ("[T]he apparent futility of presenting claims to state courts does not constitute cause for procedural default."). Finally, Petitioner asserts as cause the ineffectiveness of appellate counsel. However, a claim of ineffective assistance must be presented to the state court as an independent claim before it may be used to establish cause for a procedural default. Murray v. Carrier, 477 U.S. 478, 489, 106 S. Ct. 2639, 2640 (1986). Petitioner did not present this claim of ineffective assistance to the state

court as an independent claim. Petitioner has failed to establish cause for the procedural default of Claim 2. The Court therefore declines to conduct a prejudice analysis.

Petitioner also asserts that a fundamental miscarriage of justice will occur if Claim 2 is not heard on the merits because he is actually innocent of the death penalty. To establish this exception to procedural default, Petitioner must show by clear and convincing evidence that, but for a constitutional error, no reasonable factfinder would have found the existence of any aggravating circumstance or other condition of eligibility for the death sentence under Arizona law. Sawyer v. Whitley, 505 U.S. at 345, 112 S. Ct. at 2522. Petitioner argues that had the jury been instructed on second degree murder, it would have found him guilty of that lesser offense, thereby making him "actually innocent" of the death penalty. (File doc. 31 at 22.) However, even if such an instruction had been given, Petitioner has failed to show that a reasonable juror would not have found him guilty of first degree murder. The Court therefore finds that a fundamental miscarriage of justice will not occur if Claim 2 is not addressed on the merits.

Claim 3: The A.R.S. § 13-703(F)(4) Aggravating Factor of Procuring Offense by Promise of Pecuniary Gain is Unconstitutionally Vague.

Petitioner argues that A.R.S. § 13-703(F)(4) is unconstitutionally vague in violation of his right to due process under the Fourteenth Amendment because at

the time of the instant offense it provided no notice that the procurement of a burglary during which a murder occurred would subject a person to the death penalty. (File doc. 17 at 6; File doc. 18 at 30-35.)

Petitioner did not raise Claim 3 in state court. For the reasons discussed supra at pages 10-12, the Court rejects Petitioner's argument regarding the state supreme court's fundamental error review. The Court finds that Claim 3 was not properly presented to the state's highest court and that Petitioner is precluded now from raising this claim in state court. See Ariz. R. Crim. P. 32.2(a)(3).

Petitioner's allegation of cause – counsel's alleged conflict of interest – is insufficient to overcome the default. See discussion supra at 13-14. Because Petitioner has failed to establish cause, the Court need not analyze prejudice. Petitioner has also failed to show that a fundamental miscarriage of justice will occur if this claim is not heard on the merits. Claim 3 is therefore procedurally barred.

Claim 4: Prosecutorial Misconduct

Petitioner contends that the prosecution's pursuit of inconsistent motive theories prejudiced him at trial and sentencing, in violation of his right to due process under the Fourteenth amendment. (File doc. 17 at 7; File doc. 18 at 35-40.) According to Petitioner, during trial the state alleged as motive that he went to the Hills' home in search of his companion Susan. This apparently served as the basis for introducing evidence of prior instances in which Petitioner had found Susan

and threatened her into returning home. At sentencing, however, the state asserted that the impetus of the murder was to steal money and drugs. Petitioner claims this lead to the court's finding two aggravating factors related to financial gain. See A.R.S. §§ 13-703(F)(4) – (F)(5). In his habeas petition, Petitioner argues that he was entitled to a trial and sentencing "free from such prosecutorial misconduct." (File doc. 18 at 40.)

The parties dispute whether this claim was raised in Petitioner's direct appeal to the Arizona Supreme Court. Petitioner argues the claim was fairly presented in his appellate brief by virtue of the following excerpt:

> The State's theory of this case was that the Appellant was searching for his common law wife, Susan, and that he either thought she was in Yuma or thought that the Hills could tell him where she was. It was because of this argument that the State was permitted to introduce the prior bad acts of the Appellant: two previous trips where the Appellant had gone searching for his common law wife. If this was not the State's theory of the case then these prior acts were irrelevant and should not have been introduced. The State, now with the trial court's ruling, attempts to have its cake and eat it too. Appellant argues that one of two theories must be elected. If, as the State argues, the purpose of the Appellant being in Yuma was to find Susan Hill, then the crime was not committed

> by Appellant promising to pay or expecting to receive anything of value.

(File doc. 25, Ex. A at 28-29; citations omitted.)

Respondents correctly observe that this argument was made in the context of Petitioner's challenge to the sentencing court's imposition of the (F)(4) and (F)(5) pecuniary value aggravating factors. (File doc. 34 at 7.) Specifically, Petitioner argued that neither aggravating factor had been proven beyond a reasonable doubt because "[i]n the state's theory, the underlying crime in the instant case has to be either assault or kidnapping, not the desire for money." (File doc. 25, Ex. A at 30.) Nowhere in his appellate brief does Petitioner allege that the state engaged in prosecutorial misconduct. Nor is there any allegation that Petitioner's due process rights were violated by the assertion of allegedly inconsistent theories.

The Court concludes that Claim 4 is substantially different from the sufficiency of evidence argument raised in petitioner's appellate brief and that this claim was not presented to the state's highest court. The Court further finds that Petitioner has no available state remedies because the claim would be found precluded under Rule 32.2(a)(3) if raised in state court now. Petitioner raises the same cause and prejudice and fundamental miscarriage of justice arguments already addressed by the Court and found to be without merit. Therefore, Claim 4 is procedurally barred.

Claim 5: Failure to Properly Reweigh Sentencing Factors

In Claim 5, Petitioner contends that the Arizona Supreme Court failed to properly reweigh the aggravating and mitigating circumstances following the reversal of one aggravating factor, in violation of his rights under the Eighth and Fourteenth Amendments. (File doc. 17 at 7-8; File doc. 18 at 40-48.) Petitioner asserts this claim was presented to the state's highest court in the petition for review from the trial court's PCR ruling. Respondents disagree.

To fairly present a claim, a petitioner must describe both the operative facts and legal theories on which his claim is based. Anderson v. Harless, 459 U.S. 4, 6, 103 S.Ct. 276, 277 (1982). In his petition for review, Petitioner raised one claim – ineffective assistance of counsel for failing to investigate and present mitigation evidence. In asserting prejudice resulting from counsel's alleged ineffectiveness, Petitioner noted that because the Arizona Supreme Court reversed one of his aggravating factors, the failure to present mitigation evidence "gives rise to the significant probability that the sentence might have been different upon review and reweighing by the Arizona Supreme Court." (R.O.A. 221 at 19-20). This statement was clearly made in the context of Petitioner's Sixth Amendment claim. Nowhere in the petition for review does Petitioner assert that the high court's reweighing was flawed or that the supreme court's actions amounted to a violation of the Eighth and Fourteenth Amendments.

The purpose of the exhaustion doctrine is to provide state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts. O'Sullivan v. Boerckel, 119 S. Ct. 1728, 1732 (1999). This is accomplished by invoking "one complete round of the State's established appellate review process." Id. The issue here is whether Petitioner should have presented Claim 5 in a motion for reconsideration of the Arizona Supreme Court's decision, an avenue of relief clearly outlined in the Arizona Rules of Criminal Procedure. See Ariz. R. Crim. P. 31.18(b) ("Any party desiring reconsideration of a decision by the appellate court."). Arguably, the issue should have been raised in such a motion because that would have been the first (and, under the limited scope of Rule 32 post-conviction proceedings, likely the only) opportunity to assert that the Arizona Supreme Court committed constitutional error in its review of Petitioner's sentence. If this is true, then Claim 5 is barred from review on the merits (absent cause and prejudice or a miscarriage of justice) due to Petitioner's failure to present the claim to the state's highest court and his inability to do so now. See O'Sullivan, 119 S. Ct. at 1734; Coleman, 501 U.S. at 735 n.1, 111 S. Ct. at 2557 n.1. See also Correll v. Stewart, 137 F.3d 1404, 1418 (9th Cir. 1998) (finding no cause for attorney's failure to file motion for reconsideration regarding propriety of Arizona Supreme Court's reweighing of capital sentencing factors).

On the other hand, the Court questions whether the fact that the Arizona Supreme Court undertook the reweighing is itself sufficient to preserve the claim for

federal review. In State v. Watson, the Arizona Supreme Court made clear that its duty to independently reweigh sentencing factors and determine whether the death penalty should be imposed derives from federal constitutional concerns that the penalty not be inflicted in an arbitrary and capricious manner. 129 Ariz. 60, 63, 628 P.2d 943, 946 (1981) (citing Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960 (1976), Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909 (1976), and Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759 (1980). Thus, by engaging in its common law duty to independently reweigh the sentencing factors, it can be said that the Court had "one full opportunity" to resolve the constitutional concerns arising from its striking of one of the aggravating factors upon which Petitioner's sentence was based.

The Court declines at this time to determine the difficult issues surrounding the procedural status of Claim 5. Accordingly, in the briefing schedule established by this Order, the parties shall address the merits of Claim 5 and submit additional argument concerning its procedural status.

Claim 6: The A.R.S. § 13-703(F)(6) Aggravating Factor of Especially Heinous, Cruel, or Depraved is Unconstitutional as Applied to Petitioner.

This Claim has three parts:

(A) Insufficient evidence that Petitioner intended or reasonably foresaw the victim's suffering resulted in an arbitrary

cruelty finding in violation of Petitioner's rights under the Eighth and Fourteenth Amendments;

(B) Insufficient evidence of Petitioner's involvement in the crime resulted in an arbitrary heinous/depraved finding in violation of Petitioner's rights under the Eighth and Fourteenth Amendments.

(C) The (F)(6) aggravating factor, as applied in Petitioner's case, failed to sufficiently channel the sentencer's discretion in violation of the Eighth and Fourteenth Amendments.

(File doc. 17 at 9; File doc. 18 at 49-57.)

Respondents concede that Claim 6-B is actually exhausted. (File doc. 25 at 5.) However, they assert that Claims 6-A and 6-C were never presented to the state's highest court and that Petitioner is precluded now from raising them in state court.

On direct appeal, Petitioner argued that the state had failed to prove the "especially heinous, cruel, or depraved" aggravating factor beyond a reasonable doubt. (File doc. 25, Ex. A at 28.) In regard to the cruelty aspect of this factor, Petitioner asserted there was insufficient evidence the victim actually suffered pain or mental distress. (Id. at 30-31.) In habeas Claim 6-A, however, Petitioner admits evidence arguably exists from which to conclude the victim suffered. He instead alleges the determinant issue is

whether Petitioner "intended" or "reasonably foresaw" that Sterleen Hill would suffer. (File doc. 18 at 51-52.) The Court agrees with Respondents that Claim 6-A is substantially different from the cruelty issue raised on direct appeal and that Petitioner has failed to present the claim to the state's highest court."[7]

As for Claim 6-C, the Court finds that the issue was fairly presented to the Arizona Supreme Court on direct appeal. In his opening brief, Petitioner argued that the (F)(6) aggravating factor was too broadly construed, failing to provide a principled way to distinguish his case from those in which the death penalty was not imposed. (File doc. 25, Ex. A at 36.) The Court therefore will review the claim on the merits.

The Court finds that Petitioner could not now return to state court to exhaust Claim 6-A. See Ariz. R. Crim. P. 32.2(a)(3). Petitioner offers no cause and prejudice or miscarriage of justice arguments for the failure to properly present this claim to the state's highest court. Accordingly, Claim 6-A is procedurally barred. Claims 6-B and 6-C will be decided on the merits.

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[7] In his supplemental PCR petition, Petitioner argued that cruelty could not be established because there was insufficient evidence he intended to inflict pain or suffering. (R.O.A. 140 at 16.) Although the trial court addressed other arguments concerning the cruelty finding. It does not appear that the court specifically ruled on this issue. (See R.OA. 152.) Nonetheless, Petitioner failed to include the claim in his petition for review to the Arizona Supreme Court.

Claim 7: Insufficient Enmund/Tison Finding

In this claim, Petitioner asserts that imposition of the death penalty violated his rights under the Eighth and Fourteenth Amendments. (File doc. 17 at 10; File doc. 18 at 57-62.) Respondents admit this claim is properly exhausted. (File doc. 24 at 5.) Therefore, the Court will review Claim 7 on the merits.

Claim 8: Ineffective Assistant of Sentencing Counsel

For habeas Claim 8, Petitioner alleges his right to counsel under the Sixth Amendment was violated by sentencing counsel's failure to investigate and present all mitigating circumstances, including evidence of Petitioner's medical history, dysfunctional blended family, sexual abuse, educational history and IQ, work history, and marital and relationship history. (File doc. 17 at 10-11; File doc. 18 at 62-72.)

Respondents contend that Petitioner has properly exhausted his claim of ineffectiveness only as to counsel's failure to present evidence of low intelligence and lack of education. (File doc. 34 at 11.) Although Petitioner raised other aspects of Claim 8 in his petition for review from the trial court's post-conviction ruling, Respondents assert that these were not first presented to the lower court as required by the Arizona Rules of Criminal Procedure. See Ariz. R. Crim. P. 32.9 (limiting petition for review to issues decided by trial court). The Court disagrees.

In his supplemental PCR petition, Petitioner argued that sentencing counsel had failed to present as mitigating circumstances his lack of intent to kill, low intelligence, lack of education, lack of criminal record, and conviction on a felony-murder theory. (R.O.A. 140 at 21-22.) In memoranda filed after the post-conviction evidentiary hearing, Petitioner criticized sentencing counsel for failing to conduct any pre-sentencing investigation or to offer any mitigating circumstances on his behalf. (R.O.A. 202 at 24.) He specifically complained of counsel's failure to investigate and present evidence of Petitioner's life history, remorse, potential for rehabilitation, close family ties, good behavior while incarcerated, educational history and IQ, difficult developmental years, medical history, and lack of propensity for violence. (Id. at 34-49.) The state trial court reviewed Petitioner's allegations of ineffectiveness on the merits, and Petitioner included them in his petition for review to the Arizona Supreme Court. (R.O.A. 212 at 4-6; R.O.A. 221 at 9-11.)

The Court finds that Claim 8, in its entirety, was fairly presented in state court and is actually exhausted. Therefore, the claim will be reviewed on the merits.

Claim 9: Unconstitutionality of Arizona's Execution Statute in Forcing Petitioner to Choose Between Lethal Gas and Lethal Injection

In this claim, Petitioner alleges that Arizona's execution statute violates the Constitution's Ex Post Facto clause and the Eighth and Fourteenth

Amendments by failing to provide notice of the manner of punishment Petitioner will endure and by requiring Petitioner to choose between two methods of execution. (File doc. 17 at 11; File doc. 18 at 72-77.) In his Traverse, Petitioner requests that Claim 9 be withdrawn from his Amended Petition. (File doc. 31 at 32.) The Court therefore will not consider either the procedural status or merits of Claim 9.

CONCLUSION

The Court finds that Claims 1, 2, 3, 4, and 6-A are procedurally barred. Claim 9 is withdrawn. The parties will brief the merits of the remaining claims.

Accordingly,

IT IS ORDERED that, no later than **ninety (90) days** following entry of this Order, Petitioner shall file a Memorandum regarding the merits of Claims 5, 6-B, 6-C, 7, and 8.

IT IS FURTHER ORDERED that no later than **sixty (60) days** following the filing of Petitioner's Memorandum, Respondents shall file an Amended Answer Re: Merits.

IT IS FURTHER ORDERED that no later than **thirty (30) days** following the filing of Respondents' Amended Answer, Petitioner may file a Reply.

IT IS FURTHER ORDERED that argument concerning the procedural status of Claim 5 shall be included in the merits briefing schedule outlined herein.

IT IS FURTHER ORDERED that Claims 1, 2, 3, 4, and 6-A are procedurally barred.

IT IS FURTHER ORDERED that Claim 9 is withdrawn.

IT IS FURTHER ORDERED that if, pursuant to Local Rule 1.10(p), Petitioner or Respondents file a Motion for Reconsideration of this Order, such motion shall be filed within fifteen (15) days of the filing of this Order. The filing and disposition of such motion does not toll the time for the filing of any merits brief scheduled under this Order.

IT IS FURTHER ORDERED that the Clerk of the Court forward a copy of this Order to the Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix, AZ 85007-3329.

DATED this 8th day of August, 1999.

s/_____
ROGER G. STRAND
United States District Judge

Copies to all counsel of record

APPENDIX C

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_ RECEIVED __ COPY
MAR 21 2005
CLERK U.S. DISTRICT COURT
DISTRICT OF ARIZONA
BY S/_____ _____DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

FRED LAWRENCE ROBINSON, Petitioner,	)	No. CIV 96-669-PHX-RGS
vs.	)	
DORA B. SCHRIRO,[1] et al., Respondents.	)	MEMORANDUM OF DECISION AND ORDER

Petitioner Fred Lawrence Robinson ("Petitioner") seeks federal habeas relief from his 1987 conviction and resulting in death sentence. (Dkt.1.)[2] Petitioner filed an initial habeas petition on March 14, 1996, before the effective date of the Antiterrorism and Effective Death penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996). Accordingly, the provisions of the AEDPA do not apply to this case. Lindh v. Murphy, 521 U.S. 320, 336 (1997.)

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[1] Dora B. Schriro is substituted for her predecessor as Director, Arizona Department of Corrections, pursuant to Fed. R. Civ. P. 25(d)(1).

[2] "Dkt" refers to documents in this Court's file.

In an Amended Petition filed on May 6, 1997, Petitioner raised nine claims. (Dkt. 17.) In an Order filed August 9, 1999, the Court determined that Claims 1-4 and 6-A were procedurally barred, and Claim 9 was withdrawn at Petitioner's request. (Dkt 40.) In this Order, the Court addresses the merits of Claims 5, 6-B, 6-C, 7 and 8 and finds that Petitioner is not entitled to federal habeas corpus relief.

FACTUAL and PROCEDURAL BACKGROUND

Sometime after 11:00 p.m. on June 8, 1987, there was a knock at the front door of Ralph and Sterleen Hills' Yuma home. Through the door a man told the Hills' teenage son, Le Sean, that he had come by to pay money he owed Ralph. When Le Sean opened the door, two men forced their way into the home and attempted to grab Le Sean. Le Sean managed to evade the men and fled from the home to get help. Le Sean's parents, awakened by the noise, left their bedroom to investigate. (RT 12/10/87 at 123.)[3] In the dining room, Ralph saw the shadows of two men holding something in their hands and heard one of the men yell, "We're narcotics agents. We want the dope and the money." (Id. at 123, 133-34.) The Hills were ordered back into their bedroom, told to lie

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[3] "RT" refers to reporter's transcript. "ROA" refers to eight volumes of instruments and minute entries from the trial, direct appeal and post-conviction proceedings, documents 1-263. (Arizona Supreme Court No. SC87C14064). The original reporter's transcripts and certified copies of the trial and post-conviction records were provided to this Court by the Arizona Supreme Court. (See Dkts. 28, 29.)

face down on the floor, and their hands and feet were bound. (Id. at 134, 127, 134-36.) One of the men ransacked the couple's bedroom while the second man stood over the couple, sometimes "screwing" a pistol is Ralph's ear. (Id. at 125-26; RT 12/9/87 at 33.) Ralph glimpsed a young black man with a mustache and long sideburns wearing a red bandana, whom he did not recognize, searching the couple's closet and dresser. (RT 12/10/87 at 125, 136-37, 147-48.) Ralph heard a man say, "we better get the kid." (Id. at 126-27.) Before losing consciousness, Ralph heard Sterleen ask to have her feet covered. Both Hills were shot at close range with a .12 gauge pump action shotgun, resulting in massive injuries to Ralph and killing Sterleen. A cigarette lighter holder, a watch, and a locked box containing a gold watch and coins were taken from the home.

Shortly after the shooting, Petitioner Fred Robinson, the common-law husband of Susan Hill, Ralph Hill's daughter from a previous marriage, was apprehended by police fleeing the Hills' neighborhood in his tan Chevette. Petitioner and Susan had been in a relationship together since 1972, parenting three children. (R.T. 12/8/87 at 70.) Their relationship was stormy, as Petitioner verbally and physically abused Susan. (Id. at 71-72, 74, 83.) On at least three occasions, Susan had attempted to leave their Banning, California home. (Id. at 73-74, 76-82, 84-94.) Each time, however, Petitioner found her and threatened her life if she did not return to him. (Id.) In February 1987, Susan persuaded Petitioner to take her to visit her father in Yuma. (Id. at 97.) While there, Susan informed Petitioner by letter that

Sterleen had obtained a peace bond against him and that he should not enter their property. (Id. at 101-102.) Thereafter, unbeknownst to Petitioner, Susan left Yuma to stay with other relatives in California. (Id. at 102-103.)

In a search of Petitioner's car, police found an empty .12 gauge shotgun shell box and a red bandana. During a pat search of Petitioner, police found four .38 caliber cartridges. Petitioner's shoes were confiscated and later matched to footprints outside the Hill's home, which evidenced a limp of the left leg, like the one Petitioner had as a result of a motorcycle accident. However, neither Le Sean nor Ralph Hill, who had known Petitioner for years, identified him as one of the men they saw that night. (RT 12/2/87 at 12; 12/10/87 at 148.) Le Sean testified that one of the men could have been white. (RT 12/2/87 at 55, 56.) The day after the murder, two of Petitioner's friends, Jimmy Lee Mathers and Theodore Washington, were separately arrested in California.[4] They were subsequently transferred to Yuma, where they and Petitioner were charged with first degree murder, attempted first degree murder, two counts of aggravated assault, burglary and armed robbery. They were tried jointly in December 1987.

At trial, the prosecution's theory of the crime was that Petitioner had driven Mathers and Washington to the Hills' home and , while he waited outside, Mathers and Washington employed the ruse to gain entry into the house. Once inside, they bound the

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[4] Petitioner and Washington are both black; Mathers is white.

Hills and ransacked their bedroom for valuables. After Ralph glimpsed Washington, Mathers shot him and Sterleen, before they fled the residence. At trial, Petitioner's son Andre testified that on the day of the crime, he overheard his father, Mathers and Washington discuss a trip to Yuma. (RT 12/8/87 at 10-11.) According to Andre, Washington was wearing a red headband. (Id. at 15-16.) Mathers told Andre that they were "going to Arizona to take care of some business" (RT 12/9/87 at 5), Petitioner told another son, Truman, that he was going to Arizona to look for Susan (RT 12/4/87 at 95-96, 132, 158-59). Both Andre and Truman observed their father and Mathers put some guns, including a shotgun, in Petitioner's tan Chevette and later drive toward Washington's house, one block away. (RT 12/4/87 at 97-98, 102-104, 108-109, 124-31, 135-38, 150, 154-58; 12/8/87 at 6-7.) Shortly thereafter, Truman spotted his father, Mathers, and Washington drive by in the vehicle, apparently on their way to Arizona. (RT 12/4/87 at 135-36.)

At trial, over defense objections, evidence was admitted regarding three occasions prior to the murder in which Petitioner had forced Susan to return to their Banning home. In 1984, Petitioner had gone to Susan's workplace and threatened her to compel her return. (RT 12/8/87 at 73-74.) In June 1986, two of Petitioner's friends, who were armed, forced their way into the apartment of Susan's sister Darleen, where Susan was staying, and tied up Darleen and her daughter. (Id. at 78-80.) Petitioner, armed with a knife, then came into the apartment looking for Susan and found her hiding in a bedroom closet. (Id.) Susan testified that Petitioner told her that he had intended

to cut her and Darleen's throats, but changed his mind because Darleen's daughter was there. (Id. at 81.) Susan testified that she returned with Petitioner to Banning the next day after he threatened to hurt Darleen and her daughter if she refused. (Id. at 82.) In November 1986, Susan, went to Philadelphia, Pennsylvania, to live with an aunt and uncle without telling Petitioner. (Id. at 84.) In January 1987, after discovering her whereabouts, Petitioner went to Philadelphia with Mathers, among others, to retrieve her. (Id. at 89-90.) Susan testified that Petitioner threatened to hurt her aunt and uncle if she refused to return to California with him. (Id.)

On December 15, 1987, a jury convicted the three defendants of all charges. Prior to sentencing for the first degree murder, the trial court held a joint aggravation/mitigation hearing. At that hearing, evidence was admitted over Petitioner's objection that he had told Washington that the purpose for the trip was to "take off" a drug dealer who purportedly lived in the Hills' home and that Petitioner had said "if things get rough, shoot 'em." (RT 1/8/88 at 59-60.) Petitioner's counsel did not present evidence at the hearing, but in a sentencing memorandum urged the court to find two statutory mitigating circumstances. (RT 1/8/88 at 196, ROA 106-11-13.) At the close of the aggravation/mitigation hearing, counsel also urged two non-statutory mitigating circumstances: that Petitioner did not have a history of harming people when he had previously looked for Susan and that he

was a good father.[5] (RT 1/8/88 at 195-96.)

Although the State had urged only two aggravating factors, the trial court found three: (1) that Petitioner committed the murder in consideration for or in the expectation of anything of pecuniary value under A.R.S. § 13-703(F)(5); (2) that the murder was committed in an especially heinous, cruel or depraved manner under A.R.S. § 13-703(F)(6); and (3) that Petitioner procured commission of the murder by the payment or promise of payment of anything of pecuniary value under A.R.S. § 13-703(F)(4). State v. Robinson, 165 Ariz. 51, 59, 796 P.2d 853, 861 (1990). The court found that no statutory mitigating circumstances existed and that "no other mitigating circumstances were presented by [Petitioner] for consideration," and sentenced Petitioner to death. (RT 1/13/88 at 9-10.)

In a consolidated opinion addressing Petitioner's and Washington's direct appeals, the Arizona Supreme Court found that the trial court had improperly considered Washington's post-arrest statements in concluding that Petitioner had procured the murder by payment or promise of something of pecuniary value, but found that sufficient other admissible evidence otherwise supported the (F)(4) factor. Robinson, 165 Ariz. at 59, 796 P.2d at 861. The Arizona Supreme Court "set aside" the trial court's finding that

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[5] Petitioner's counsel noted that Petitioner had "9, 12, 15 kids or something by several different women" and that "from what I could see from testimony, 2 pretty good kids and presumably the other children just as well as those 2." (Id.)

Petitioner had committed the murder in the expectation of pecuniary gain under A.R.S. § 13-703(F)(5), concluding that unlike Washington, "no evidence" supported finding that Petitioner's involvement in the crime was motivated by an expectation of pecuniary gain; rather, it concluded that Petitioner was motivated by "revenge coupled with a desire to locate Susan." Id. at 60, 796 P.2d at 862. The supreme court affirmed the trial court's findings that the murder was both especially cruel and especially heinous or depraved. Id. at 61, 796 P.2d at 863. The supreme court reweighed the remaining aggravating factors against the mitigating circumstances and affirmed Petitioner's death sentence. Id. It also affirmed Washington's conviction and sentence. Id. In a separate opinion, the supreme court reversed Mathers's conviction, finding insufficient evidence to show his participation in the crime. See State v. Mathers, 165 Ariz. 65, 796 P.2d 866 (1990).

Following the affirmance of his conviction and death sentence, Petitioner filed a petition for post-conviction review ("PCR") in the trial court. The PCR court found most of Petitioner's claims procedurally barred, but on September 8-9, 1993, held a joint evidentiary hearing on Petitioner's and Washington's ineffective assistance of counsel claims and claims based on Mathers's acquittal. On August 12, 1994, following additional briefing, the PCR court denied relief on Petitioner's remaining claims. (ROA 212.) On April 25, 1995, the Arizona Supreme Court summarily denied Petitioner's petition for review. (ROA 236.) Petitioner thereafter commenced this habeas action.

Claim 5: Failure to Properly Reweigh Sentencing Factors

Claim 5 alleges that the Arizona Supreme Court failed to reweigh properly the aggravating and mitigating circumstances, in violation of Petitioner's Eighth and Fourteenth Amendment rights, after it invalidated the (F)(5) aggravating factor. (Dkts. 17 at 7-8; 18 at 40-48.) Specifically, Petitioner alleges that the state supreme court failed to conduct a thorough analysis of the effect of the invalidated aggravating circumstance on the trial court's weighing of the sentencing factors or, alternatively, to determine that the weighing of the invalidated aggravating factor by the trial court constituted harmless error. (Dkt. 18 at 42-47.) Petitioner argues that in purporting to reweigh the remaining aggravating circumstances against the mitigating circumstances, the supreme court failed to consider the mitigating circumstances urged by Petitioner at sentencing, stating that "Robinson offered no mitigating circumstances and we agree with the trial court that none exist." (Id. at 46-47, quoting Robinson, 165 Ariz. at 61, 796 P.2d at 863.)

The Court previously declined to determine whether Petitioner properly had exhausted Claim 5 subject to further briefing by the parties regarding the issue. (Dkt. 40 at 19-22.) The parties included additional briefing regarding the procedural status of this claim in their merits briefs. The Court has reviewed those briefs and concludes that review on the merits of Claim 5 is procedurally barred.

Principles of Exhaustion and Procedural Default

To properly exhaust state remedies, a petitioner must "fairly present" his claims to the state's highest court in a procedurally appropriate manner. O'Sullivan v. Boerckel, 526 U.S. 838, 848 (1999). A claim is "fairly presented" if the petitioner has described the operative facts and the federal legal theory on which his claim is based so that the state courts have a fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim. Anderson v. Harless, 459 U.S. 4, 6 (1982); Picard v. Connor, 404 U.S. 270, 277-78 (1971).[6] Explicit fair presentation must be made not only to the trial or post-conviction court, but to the state's highest court. Baldwin v. Reese, 541 U.S. 27, 124 S. Ct. 1347, 1351 (2004).

A habeas claim may be precluded from federal review in either of two ways. First, a claim may be procedurally defaulted in federal court if it was actually raised in state court but found by that court to Be defaulted on state procedural grounds. Coleman v. Thompson, 501 U.S. 722, 729-30 (1991). Second, a claim may be procedurally defaulted in federal court if the petitioner failed to present the claim in any forum and "the court to which the petitioner would be required to present his claim[] in order to meet the exhaustion requirement would now find the claim[]

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[6] Resolving whether a petitioner has fairly presented his claim to the state court is an intrinsically federal issue to be determined by the federal court. Wyldes v. Hundley, 69 F.3d 247,251 (8th Cir. 1995); Harris v. Champion, 15 F.3d 1538, 1556 (19th Cir. 1994).

procedurally barred." Coleman, 501 U.S. at 735 n.1. This is often referred to as "technical" exhaustion because although the claim was not actually exhausted in state court, the petitioner no longer has an available state remedy. See Gray v. Netherland, 518 U.S. 152, 161-62 (1996) ("A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no remedies any longer 'available' to him.").

Rule 32 of the Arizona Rules of Criminal Procedure governs when petitioners may seek relief in post-conviction proceedings and raise federal constitutional challenges to their convictions or sentences in state court. Rule 32.2 provides, in part:

> a. Preclusion. A defendant shall be precluded from relief under this rule based upon any ground:
>
> . . . .
>
> (2) Finally adjudicated on the merits on appeal or in any previous collateral proceeding;
>
> *(3) That has been waived at trial, on appeal, or in any previous collateral proceeding.*
>
> b. Exceptions: Rule 32.2(a) shall not apply to claims for relief based on Rules 32.1(d), (e), (f), (g) and (h). When a claim under [these sub-sections] is to be raised in a successive or untimely post-conviction relief proceeding, the notice of post-conviction relief must set forth the substance of the specific exception and the

> reasons for not raising the claim in the previous petition or in a timely manner. If the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition or in a timely manner, the notice shall be summarily dismissed.

Ariz. R. Crim. P. 32.2 (West 2003) (emphasis added). Thus, pursuant to Rule 32.2, a petitioner may not be granted relief on any claim which could have been raise din a prior petition for post-conviction relief. Only if a claim falls within certain exceptions (subsections (d) through (h) of rule 32.1) and the petitioner can justify why the claim was omitted from a prior petition will the preclusive effect of Rule 32.2 be avoided.

Therefore, if a claim was not raised previously in state court, this Court must determine whether Petitioner has state remedies currently available to him pursuant to Rule 32. If no remedies are currently available, then the claim is "technically" exhausted but procedurally defaulted. Coleman, 501 U.S. at 732, 735 n. 1. Because the doctrine of procedural default is based on comity, not jurisdiction, federal courts retain the power to consider the merits of procedurally defaulted claims. Reed v. Ross, 468 U.S. 1, 9 (1984). However, as a general matter, the Court will not review the merits of a procedurally defaulted claim unless a petitioner demonstrates legitimate cause for the failure to properly exhaust in state court and prejudice from the alleged constitutional violation, or shows that a fundamental miscarriage of justice would

result if the claim were not heard on the merits in federal court. Coleman,501 U.S. at 735 n. 1.

Exhaustion Analysis

In light of the parties' supplemental briefing, the Court considers three ways in which Petitioner may have fairly presented this claim to the state's highest court: (1) by virtue of the Arizona Supreme Court's sentencing review; (2) by way of a motion for reconsideration to the Arizona Supreme Court; or (3) by including the claim in his petition for review from denial of his PCR petition.

First, the Court rejects Petitioner's contention that the supreme court had a fair opportunity to address the reweighing claim during its sentencing review. This claim could not have been exhausted as part of Petitioner's direct appeal when the supreme court conducted a sentencing review, because it is during that review that the errors are alleged to have occurred.

Second, Petitioner argues that no rule or procedure existed in Arizona that *required* him to seek reconsideration from the supreme court's decision,, noting that Ariz. R. Crim. P. 31.18 provides that a party "desiring reconsideration of a decision of an appellate court *may* file a motion for reconsideration fro an appellate court." (Dkt, 41 at 17) (emphasis added). However, in order to give the state's highest court the opportunity to rule on his claim of error arising during his direct appeal, the proper method is to file a motion for reconsideration with the Arizona

Supreme Court See Correll v. Stewart, 137 F.3d 1404, 1418 (9th Cir. 1998) (finding procedural default of claim based on error of the Arizona Supreme Court where petitioner failed for file motion for reconsideration, which is "an avenue of relief that the Arizona Rules of Criminal Procedure clearly outline."). By not filing a motion for reconsideration, Petitioner sidestepped the best method by which he could have raised this claim.

Third, in the absence of filing a motion for reconsideration, Petitioner could have attempted to fairly present this claim at each level of the state system through his PCR petition. In fact, Petitioner presented the substance of Claim 5 in his first PCR petition. Petitioner contends that he also presented it in his petition for review to the Arizona Supreme Court from the denial of his PCR petition. Petitioner presented only one claim in his petition for review- ineffective assistance of counsel for failing to investigate and present mitigation evidence. In arguing that he was prejudiced by counsel's alleged ineffectiveness, Petitioner noted that because the Arizona Supreme Court reversed on of the aggravating factors, counsel's failure to present mitigation evidence, "gives rise to the significant probability that the sentence might have been different upon review and reweighing by the Arizona Supreme Court." (ROA at 19-20.) As the Court previously noted, that statement was clearly made in the context of Petitioner's Sixth Amendment claim and "[n]owhere in the petition for review does Petitioner assert that the high court's reweighing was flawed or that the supreme court's actions amounted to a violation of the

Eighth and Fourteenth Amendments." (Dkt. 40 at 20.) Therefore, the Court finds that Petitioner did not fairly present the substance of Claim 5 to the Arizona Supreme Court in his petition for review.

Petitioner was obligated to give the Arizona state courts at least "*fair* opportunity to act on [his] claim []." O"Sullivan, 526 U.S. at 844. Because Claim 5 alleges error occurring during the Arizona Supreme Court's sentencing review, that review itself did not provide the court notice of, or an opportunity to correct, the alleged error. Petitioner subsequently neglected to make use of the available opportunities to fairly present his reweighing claim to the Arizona Supreme Court–either in a motion for reconsideration, or in his petition for review from denial of his PCR petition. Thus, Petitioner failed to fairly present this claim to the Arizona Supreme Court as required for proper exhaustion. See Bell v. Cone, 125 S.Ct. 847, 851 n.3 (2005)(finding that a petitioner must present every claim to the state's highest court if there is an available means). Petitioner is not procedurally precluded from presenting this claim in state court by Rule 32.2(a)(3) of the Arizona Rules of Criminal Procedure. This Court therefore finds that Claim 5 is technically exhausted but procedurally defaulted, and review on the merits of the claim is procedurally barred unless Petitioner demonstrates either cause and prejudice or a fundamental miscarriage of justice to excuse the default. Petitioner has done neither. (Dkt. 36 at 10-11.) This claim will be dismissed as procedurally defaulted.

Claims 6-B and 6-C

In Claim 6-B, Petitioner alleges that the especially heinous or depraved portion of the (F)(6) factor (hereinafter "depravity prong") was not supported by sufficient admissible evidence and, therefore, was arbitrarily found. Specifically, he alleges that the state courts imputed the *killer's* state of mind and attitude to him rather than basing the finding on *Petitioner's* state of mind and attitude. In Claim 6-C, Petitioner alleges that, as applied to him, the state courts violated the Eighth Amendment by expanding the narrowing construction they have given the depravity prong. Respondents argue that the Arizona courts' finding that the murder was especially cruel, the constitutionality of which is not before this Court on the merits, is sufficient alone to support the (F)(6) aggravating circumstance, rendering Petitioner's challenges to the depravity prong moot. Respondents also argue that the depravity prong was sufficiently established by the facts the state courts found for the purpose of satisfying the requirements of Enmund v. Florida, 458 U.S. 782, 797 (1982), and Tison v. Arizona, 481 U.s. 137, 158 (1987), and contend that the state courts did not expand the narrowing construction of the depravity prong in their application of it to Petitioner.

In Walton v. Arizona, the United States Supreme Court found Arizona's especially cruel, heinous or depraved aggravating circumstance to be facially vague, but held that Arizona courts have sufficiently narrowed application of the circumstance so as to constitutionally channel a sentencer's

discretion. 497 U.S. 639, 654 (1990), overruled in part on other grounds by Ring v. Arizona, 536 U.S. 584 (2002); Lewis v. Jeffers, 497 U.S. 764, 777-81 (1990). Because it is phrased in the disjunctive, the (F)(6) factor can be established by showing especial cruelty, heinousness or depravity, alone. See, e.g., State v. Roscoe, 184 Ariz. 484, 500, 910 P.2d 635, 651 (1996); State v. Smith, 193 Ariz. 452, 461, 974 P.2d 431, 440 (1999). Under Arizona law, "heinous" and "depraved" focus on the defendant's state of mind at the time of the offense. See State v. Fulminante, 161 Ariz. 237, 255, 778 P.2d 602 (1988); accord State v. Jimenez, 165 Ariz. at 455; State v. Amaya-Ruiz, 166 Ariz. at 178; State v. Ross, 180 Ariz. 598, 605, 886 P.2d 1354, 1361 (1994) ("heinousness and depravity refer to a defendant's vile state of mind and attitude at the time of the murder, as evidenced by his conduct"); State v. Smith, 146 Ariz. 491, 504, 707 P.2d 289, 302 (1985). A defendant's state of mind is determined by his behavior at or near the time of the offense. State v. Lujan, 124 Ariz. 365, 372, 604 P.2d 629, 636 (1979); accord State v. Poland, 132 Ariz. 269, 285, 645 P.2d 784, 800 (1982); State v. Jeffers, 135 Ariz. 404, 429, 661 P.2d 1105, 1130 (1983); State v. Martinez-Villareal, 145 Ariz. 441, 451, 702 P.2d 670, 680 (1985); State v. Greene, 192 Ariz. 431, 440 967 P.2d 106, 115 (1998).

In State v. Gretzler, the supreme court listed five factors to be considered in determining whether a murder was especially heinous or depraved and evidenced a defendant's "vile" state of mind: (1) the apparent relishing of the murder, (2) the infliction of gratuitous violence on the victim beyond the murder itself, (3) needless mutilation, (4) the senselessness of

the murder, and (5) the helplessness of the victim. 135 Ariz. 42, 51-52, 659 P.2d 1, 10-12 (1983); accord State v. Wallace, 160 Ariz. 424, 427, 773 P.2d 983, 986 (1989). The Gretzler factors are not exclusive and the Arizona Supreme Court has acknowledged two other circumstances that, in conjunction with one or more of the Gretzler factors, support a finding under the depravity prong; (6) when the murder is for the purpose of eliminating a witness; and (7) a special relationship exists between the defendant and the victim. See State v. Milke, 177 Ariz. 118, 126, 865 P.2d 779, 787 (1993); State v. Ross, 180 Ariz. 598, 606, 886 P.2d 1354, 1362 (1994); State v. Styers, 177 Ariz. 104, 116-17, 865 P.2d 765, 776-77 (1993); Fulminante, 161 Ariz. at 256, 778 P.2d at 621.

In this case, the trial court appeared to base its depravity finding on the senselessness of the murder and the helplessness of the victim. (RT 1/13/88 at 8-9) ("There is no reasonable doubt that the murder was a senseless crime. There was no way the victim could have identified anyone. She was utterly helpless and was in no manner any threat to the defendant.") The special verdict does not reflect that the trial court found any of the other Gretzler, factors, that *Petitioner* intended the killing to eliminate a witness or that Petitioner had the type of special relationship with the victim that the Arizona courts have recognized as probative of a defendant's state of mind. (Id.) The Arizona Supreme Court affirmed the depravity finding, again, apparently based solely upon the senselessness of the crime and the helplessness of the victim. It stated that "[a]s difficult as it may be to define depravity, the gangland-style action of forcing two

elderly persons to lay face down on the floor, tying them up then senselessly shooting them amounts to depraved conduct." Robinson, 165 Ariz. at 61, 792 P.2d at 863.

Claim 6-B

Petitioner challenges the sufficiency of the evidence supporting the depravity finding. To assess the sufficiency of the evidence, the appropriate inquiry, is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact" could have made the finding beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis added). Under Arizona law, a murder is senseless when it is unnecessary to the achievement of the defendant's criminal goal. See State v. Tison, 129 Ariz. 526, 543, 633 P.2d 335, 352 (1981); State v. Walden, 183 Ariz. 595, 619, 905 P.2d 974, 998 (1995); State v. Barreras, 181 Ariz. 516, 522, 892 P.2d 852, 858 (1995); State v. Murdaugh, 209 Ariz. 19, 97 F3d 844 (2004). A victim is helpless when she is physically unable to resist the murder or summon aid. State v. Murray, 184 Ariz. 9, 38, 906 P.2d 542, 571 (1995); State v. Salazar, 173 Ariz. 399, 412, 844 P.2d 566, 579 (1992). This Court concludes that a rational trier of fact could easily find that the murder was senseless and the victim helpless beyond a reasonable doubt. The killing was unnecessary to the goals of robbing the Hills or finding Susan; therefore, it was senseless. Sterleen Hill was elderly and bound lying face down on the floor when she was shot; she was completely helpless. Further whatever *Petitioner's* underlying purpose in sending armed accomplices to

force their way into the Hills' resident late at night, The evidence supports that the intent was at a minimum an attempt to find Susan; Petitioner knew the home was inhabited by her elderly parents and their teenage son, who were likely to be particularly susceptible to an unexpected late night intrusion by armed men. The potential that one or more of the home's residents might be killed by those accomplices was inherent in the circumstances. Sufficient evidence supports the state courts' senselessness and helplessness findings, which were the basis for the depravity prong of the (F)(6) factor.

Claim 6-C

Petitioner argues that by finding depravity as to him, the Arizona courts expanded the narrowing construction given to that prong, and approved by the Supreme Court, in violation of the constitution. This poses the question of whether a depravity finding based solely on senselessness and helplessness unconstitutionally expands the narrowing construction given to that prong by the Arizona courts. In Walton, the Supreme Court directed that if a state court has defined an unconstitutionally vague statutory factor, the federal court's role is to determine "whether those definitions are constitutionally sufficient, i.e., whether they provide some guidance to the sentencer." 497 U.S. at 654. The Court in Walton expressly held that both the cruelty and depravity prongs of (F)(6) have been construed by the Arizona courts in a manner that furnishes sufficient guidance to the sentencer. Id. at 655. Even if Walton does not foreclose Petitioner's claim, the Court finds no basis for habeas relief.

Generally, the Arizona Supreme Court has not found senselessness and helplessness alone sufficient to support a depravity finding because they are less probative of a defendant's state of mind. See e.g., State v. Hyde, 186 Ariz. 252, 281, 921 P.2d 655, 684 (1996); Murray, 184 Ariz. at 37-38, 906 P.2d at 570-71. However, this Court is aware of at least two other cases in which a depravity finding was upheld based expressly on helplessness and senselessness standing alone: State v. Scott, 177 Ariz. 131, 865 P.2d 792 (1993) (making a general finding that the murder stood out above the norm of first-degree murders as required to find the (F)(6) factor); State v. Lopez, 174 Ariz. 131, 144, 847 P.2d 1078, 1091 (1992) (not specifically relying on the father-child relationship between the defendant and the one-year old victim, but noting that only the defendant had the ability to obtain medical attention for the victim). In contrast, the Arizona Supreme Court has held many times that, under circumstances of a particular case, senselessness and helplessness, together or separately, were insufficient to support the depravity prong. See, e.g., State v. Moody, 208 Ariz. 424, 473, 94 P.3d 1119, 1168 (2004); State v. Carlson, 202 Ariz. 570, 584-85, 48 P.3d 1180, 1194-95 (2002); State v. Schackart, 190 Ariz. 238, 250, 947 P.2d 315, 327 (1997); State v. Lee, 189 Ariz. 590, 605-06, 944 P.2d 1204, 1219-20 (1997) (senselessness alone insufficient to support depravity). The volume of cases so holding is not dispositive. The Arizona Supreme Court state in Gretzler that, while "[t]he mere existence of senselessness or helplessness of the victim, in isolation, need not always lead to a hold that the crime is heinous or depraved, however," "[e]ither or both of these factors, considered together with other

circumstances present in a particular case, may lead to the conclusion that an offense was heinous or depraved." 135 Ariz. at 52-53, 659 P.2d at 11-12 (citing Tison, 129 Ariz. at 543, 633 P.2d at 353 (finding heinousness and depravity based on the senselessness of the murders and victims inability to escape)). Thus, it appears that a depravity finding based solely on helplessness and senselessness "furnishes sufficient guidance to the sentencer." Walton, 497 U.S. at 655.

Respondents argue that, even if the depravity prong was unconstitutionally applied to Petitioner, the cruelty prong is sufficient to sustain the finding of the (F)(6) circumstance. Petitioner counters that, if the depravity prong was unconstitutionally found as to him, the weight given the (F)(6) circumstance would be decreased. (Dkt. 46 at 13.) Petitioner does not cite authority for this proposition. Although the Arizona Supreme Court spoke ambiguously in one decision about the weight given to the (F)(6) factor depending on whether one or both prongs are found, see State v. Miller, 186 Ariz. 314, 327, 921 P.2d 1151, 1164 (1996), the overwhelming weight of authority indicates that the finding of either especial cruelty or especial depravity alone will establish the (F)(6) factor and that the validity, or lack thereof, of the other prong does not affect the weight given the circumstance. See, e.g., State v. Djerf, 191 Ariz. 583, 597, 959 P.2d 1274, 1288 (1998) ((F)(6) circumstance upheld based on cruelty alone without considering validity of depravity finding); State v. Towery, 186 Ariz. 168, 188, 920 P.2d 290, 310 (1996) (same); Roscoe, 184 Ariz. at 500-501, 910 P.2d at 651-52 (upholding (F)(6) factor based on cruelty after invalidating depravity finding); State v.

Bolton, 182 Ariz. 290, 312, 896 P.2d 830, 852 (1995) (F)(6) factor upheld based on cruelty alone without considering depravity finding). This Court has found no case holding that the invalidation of one prong of the (F)(6) circumstance decreases the weight given to the remaining prong. Thus, even if the depravity finding in this case were unconstitutional, that finding constituted at most harmless error because the state courts found the cruelty prong of the (F)(6) factor, which was sufficient, disregarding the depravity finding, to establish the factor. Accordingly, even if the depravity finding was in error, such error was harmless and Petitioner is not entitled to relief on this claim.

Claim 7: Sufficiency of Enmund/Tison Findings

In Claim 7, Petitioner alleges that insufficient evidence supports the trial court's or the Arizona Supreme Court's determinations under Enmund, 458 U.S. at 787-88, and Tison, 481 U.S. at 158, to sentence him to the death penalty. In Enmund, the Supreme Court held that a felony murder defendant could only be sentenced to the death penalty if he actually killed, attempted to kill, or intended to kill. 458 U.S. at 797. In Tison, the Court expanded Enmund's rule so that a felony murder defendant could be sentenced to death if the defendant was a major participant in the underlying felony and the defendant acted with reckless indifference to human life. 481 U.S. at 157-58; see also Greenawalt v. Ricketts, 943 F.2d 1020 (9th Cir. 1991) (finding Enmund satisfied when defendant knowingly created a grave risk of death and was an

active participant in the felonies), cert. denied, 506 U.S. 888 (1992)). Findings pursuant to Enmund may be made by the trial or appellate court. Cabana v. Bullock, 474 U.S. 376, 387 (1986). A state court's finding that Enmund/Tison is satisfied is sufficient if "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact" could have made the finding beyond a reasonable doubt. Jackson, 443 U.S. at 319 (emphasis added).

At sentencing, the trial court found that Petitioner "expected or intended that the victim would be killed and that the commission of a felony offense was occurring at the time of the murder." (RT 1/13/88 at 10.) The trial court found Petitioner's intent based on the admission at sentencing of Washington's post-arrest statement that Petitioner told him to "take off" the purported cocaine dealer who lived in the Hills' house and that "if things get rough, shoot 'em." (ROA 112 at 3.) The Arizona Supreme Court found those statements were improperly admitted against Petitioner, but found Enmund/Tison satisfied as to Petitioner based on Petitioner's involvement in the underlying felonies. Robinson, 165 Ariz. at 59-60, 62, 796 P.2d at 861-62, 864. The court stated that:

> Evidence exists in this case that Robinson loaded firearms into his vehicle in preparation for the trip from Banning to Yuma, that Washington was at least present when the hands and feet of Ralph and Sterleen Hill were bound, that the Hills were terrorized with firearms, that Robinson masterminded the trip, and that Washington

> was at least present in the Hills' home when Ralph Hill was wounded and Sterleen Hill was murdered. The requisite culpability was met as to both Robinson and Washington.

Id.

Petitioner argues that the court's findings are based solely on Petitioner putting weapons into his care in Banning and masterminding a trip to Yuma and are insufficient to support his culpability for the killing under Enmund/Tison. Petitioner argues that "[t]he evidence on which the Arizona Supreme Court based its [Enmund/Tison] finding is woefully inadequate" because "[t]he mere fact that [he] loaded guns into his car did not demonstrate that he intended to kill with them" and "[t]he finding that [he] 'masterminded' the trip is similarly flawed" because "[n]o evidence suggested that the trip he allegedly planned included murder." (Dkt. 41 at 39.) In so arguing, Petitioner ignores the supreme court's recitation of facts establishing Petitioner's substantial involvement in the crime.

The supreme court's opinion is replete with citation to evidence showing that Petitioner was a major participant in the invasion of the Hills' home and that he acted with reckless indifference in doing so. Petitioner was the only defendant who knew the Hills and where they lived prior to the attack. Petitioner enlisted the participation of two accomplices to break into the Hills' home and he provided them weapons, including the shotgun used to shoot the victims. Petitioner drove the accomplices to the home

and waited outside while they employed a ruse to gain entry into the house. Petitioner had reason to believe that none of the Hills would have admitted him to the house, and that they might have alerted police if he appeared. Whatever the purpose for the trip–to locate Susan, to rob the Hills, or to kill the Hills–the trial court concluded, and there was ample supporting evidence in the record, that petitioner chose the victims, enlisted accomplices, supplied them with weapons, transported the accomplices and the weapons to the victims' home, and provided a ruse to gain access to the house. As this Court noted above, whatever *Petitioner's* underlying purpose in sending armed accomplices to force their way into the Hills' residence late at night, Petitioner knew the home was inhabited by Susan's elderly parents and their teenage son and that they were likely to be particularly susceptible to a late night intrusion by armed men. Petitioner's role in instigating this intrusion by armed accomplices is more than sufficient to establish that he was a major participant in the underlying felonies–burglary and armed robbery. Further, the potential that one or more the home's residents might be killed by those armed accomplices was sufficient to find that Petitioner acted with reckless indifference to human life. Viewing the evidence in the light most favorable to the prosecution, a rational factfinder could easily find sufficient evidence showing that Petitioner was a major participant in the underlying felonies and that he acted with reckless indifference to human life under Enmund/Tison. Relief on this claim will be denied.

Claim 8: Ineffective Assistance of Sentencing Counsel

In claim 8, Petitioner alleges that trial counsel rendered ineffective assistance of counsel ("IAC") at sentencing in violation of his Sixth Amendment rights by failing to investigate and present mitigation evidence. Specifically, Petitioner alleges that counsel failed to investigate and present evidence regarding his: (1) history of diabetes and injuries received in a motorcycle accident; (2) dysfunctional blended family during childhood; (3) childhood sexual abuse; (4) education and intelligence; (5) work history; and (6) marital and relationship history. (Dkts. 17 at 10-11, 18 at 62-72.) To establish IAC, a petitioner must show that counsel's performance was deficient and that the deficiency prejudiced his defense. Strickland v. Washington, 466 U.S. 668 (1984).

Relevant State Court Proceedings

Prior to sentencing, Petitioner's counsel, Robert Robertson, filed a sentencing memorandum in which he argued that neither of the two statutory aggravating circumstances urged by the prosecution had been proved beyond a reasonable doubt. (Dkt. 19, ex. 17 at 7-11.) Roberson also urged the court to find two statutory mitigating circumstances in the memorandum. First, he argued mitigation pursuant to A.R.S. § 13-703(G)(3), contending that while Petitioner was legally accountable for the conduct of another, his participation was relatively minor, although not so minor as to constitute a defense to prosecution. (Id. at 11-12.) Second, he argued

mitigation pursuant to A.R.S. § 13-703(G)(4), contending that Petitioner could not have reasonably foreseen that his conduct in connection with the commission of the underlying felonies would cause, or would create a grave risk of causing, death to another person. (Id. at 12-13.) Roberson did not urge any non-statutory mitigating factors in the memorandum.

At the aggravation/mitigation hearing, Roberson cross-examined the prosecution's witnesses, but presented no witnesses on Petitioner's behalf. (RT 1/8/88 at 143.) In closing, he argued that neither aggravating circumstance had been proved beyond a reasonable doubt and that Petitioner had not been shown to have been sufficiently involved in the underlying felonies to be sentenced to death. (Id. at 187-95.) Roberson also urged, for the first time, two non-statutory mitigating factors-that Petitioner did not have a history of hurting people when looking for Susan and that he was a good father as Susan acknowledged in her trial testimony. (Id. at 195-96.)

In its special verdict, the trial court found that Petitioner procured the commission of the offense by payment or promise of receipt of something of pecuniary value to his accomplices. (ROA 112 at 2.) Further, as discussed above, it found that the murder was especially heinous, cruel and depraved, and that Petitioner had committed the offense in the expectation of something of pecuniary value. (Id. at 4.) The court also rejected both statutory mitigating factors urged by defense counsel, concluding that Petitioner was a major participant in the underlying felonies and that he had planed the killing. (ROA 112

at 2-3.) The trial court did not mention the two non-statutory mitigating factors urged by Roberson for the first time in the closing argument at the aggravation/mitigation hearing. On direct appeal, after reversing the finding of the (F)(5) circumstance and reweighing the remaining aggravating circumstances against the mitigation, the Arizona Supreme Court affirmed Petitioner's death sentence, stating that Petitioner had "offered no mitigating circumstances and we agree with the trial court that non exist." Robinson, 165 Ariz. at 61, 796 P.2d at 863.)

In his state PCR, Petitioner alleged that Roberson rendered ineffective assistance by failing to investigate and present additional mitigation at sentencing. (RT 9/9/93 at 28-77.) The PCR court held a joint evidentiary hearing on Petitioner's and Washington's IAC claims. (RT 9/8-9/93.) At the hearing before the same judge that presided over his trial, Petitioner presented testimony from three witnesses: Roberson, psychologist Tod Roy, and prison counselor Juan Gonzales. The state presented testimony from psychiatrist Eva B. McCullars.

Roberson initially described his background and experience prior to representing Petitioner. (RT 9/9/93 at 28-35.) He testified that he began practice in 1975 by clerking for an Arizona Supreme Court justice. (Id. at 29.) he then worked for the Yuma County Attorney for almost two years before joining a Yuma law firm. (Id.) At that firm, he worked on both criminal defense and civil matters. (Id. at 29-30.) He then formed a partnership with another attorney handling criminal defense and civil matters (Id. at 30-31.) Therefore,

Roberson received court appointments as criminal defense counsel pursuant to contract with Yuma County. (Id. at 32-35.) At the time Roberson was appointed to represent Petitioner, a little more than half his practice was in criminal defense. (Id. at 35.) Roberson testified that he believed he had tried a least one capital case prior to Petitioner's. (Id. at 35-36.) Roberson reduced his case load during the time he represented Petitioner to spend time on Petitioner's case. (Id. at 36.)

Roberson described his preparation for trial and sentencing in Petitioner's case. He testified that his primary focus in preparing for trial was "to get Fred off" because "there was a chance" that the prosecution would be unable to prove that Petitioner had entered the Hills' home or that Petitioner set up a killing. (RT 9/9/93 at 45, 48-49.) Roberson testified that he did not seek appointment of a mental health expert because he never saw any indication that one was warranted based on his interactions with Petitioner. (Id. at 39-40, 64, 67-68.) Roberson testified that he prepared for the sentencing phase primarily by interviewing Petitioner, but that Petitioner had been unable to provide much in the way of potential mitigation. (Id. at 55-56, 58-59.) Roberson did not remember Petitioner providing him with names of any potential mitigation witnesses. (Id. at 64, 67.) Further, Roberson explained that evidence such as family support of lack of criminal record, which he would normally consider as mitigation, was not available in Petitioner's case because two of Petitioner's sons and Susan had testified against him

at trial and Petitioner had a prior criminal record.[7] (Id. at 56, 57-58.) Roberson did believe that remorse was viable mitigation because, while Petitioner had expressed remorse for what happened to the Hills in letters to Ralph Hill, he denied any personal responsibility. (Id.) Roberson admitted he did not subpoena any school, medical, mental health or employment records for Petitioner. (Id. at 56-57, 63-64.) Roberson also conceded that a psychologist might have assisted in developing non-statutory mitigation, but noted that requesting such an expert for that type of assistance was not standard practice at the time Petitioner was tried. (Id. at 76-77.)

Based upon testing, interviews with Petitioner and his father, and a review of records, Dr. Roy diagnosed Petitioner as having a borderline personality disorder with dependent features.[8] (ROA 176; RT 9/9/93 at 77-106.) Dr. Roy attributed Petitioner's participation in the offense as resulting from his personality disorder and dependency issues in conjunction with childhood and relationship history.

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[7] According to the presentence report, Petitioner had been twice convicted of burglary for which he was sentenced to 180 days plus probation for each offense and grand theft auto for which he was fined. (ROA 108 at 4-5.) The report indicated that Petitioner hade been arrested for several other offenses, but their dispositions were either unknown or the charges dismissed. (Id.) According to the report's author, Petitioner denied several of the offenses or maintained that charges had been dismissed. (Id.)

[8] Dr. Roy testified that he reviewed Petitioner's school records and read Susan Hill's trial testimony and the witness statement of a Yuma deputy sheriff. (RT 9/9/93 at 77-106.)

(RT 9/9/93 at 93-95, 97.) Dr. Roy also found as mitigation Petitioner's diabetes, physical disability, difficult childhood, childhood sexual abuse, substandard education and low intelligence, work history, and marital and relationship history. (ROA 176 at 30-31.)

Dr. Roy found that Petitioner had suffered from diabetes for most of his life and became insulin dependent after being incarcerated. (ROA 176 at 11-12.) He further found that Petitioner had been seriously injured in a 1981 motorcycle accident, resulting in a physical disability (limp) that left him unable to work according to his own report. (Id. at 3, 11-12.) Although Petitioner also claimed to have sustained a serious head injury in the accident, Dr. Roy's review of the medical records indicated no deficit in orientation shortly after the accident and his own testing revealed no neurological damage. (Id. at 11.) According to Dr. Roy's report, Petitioner never received psychological treatment or counseling. (Id. at 17.) Dr. Roy reported that Petitioner scored in the low-average range in intelligence testing and that he preformed at a fifth-grade or lower level in educational achievement, despite having graduated from high school. (RT 9/9/93 at 85-86, 102.) Dr. Roy found that Petitioner had worked at a variety of jobs from the time he was in high school until the accident, but that following the accident, he supported himself and his dependents with government aid and by repairing cars on the side. (ROA 176 at 10, 13-14.)

Dr. Roy found significant several aspects of Petitioner's childhood history. These included

Petitioner's impoverished upbringing in a segregated Texas community (RT 9/9/93 at 87-88.), as well as the divorce of Petitioner's parents when he was eleven, in the course of which his father repudiated four of Petitioner's younger siblings as not his children (ROA 176 at 6-7). He further found significant the effect on Petitioner of his father's remarriage to a woman who favored her children over Petitioner and his and his siblings, and noted that Petitioner reported being frequently whipped by his father with belts or straps for small infractions reported by his stepmother. (Id.) Dr. Roy found significant that, as a teenager, Petitioner worked to earn enough money to buy a car but his father forced him to give the car to one of his stepbrothers who needed it for college. (Id. at 9-10.) Finally, Dr. Roy also found significant instances of childhood sexual abuse witnessed or experienced by Petitioner. (Id. at 8-9.) These included witnessing the rape of a sister by a white man when Petitioner was about nine, Petitioner's molestation by an aunt when he was a young child, and the forcible sodimization of, and threats to, Petitioner by his stepmother's boyfriend as a child. (Id.) Dr. Roy noted that discussing the latter continued to visibly upset Petitioner. (RT 9/9/93 at 88-90.) Dr. Roy conceded that all of these events occurred when Petitioner was a teenager or younger, and that he would not have expected those events to affect Petitioner thirty years later at the time of the subject offense.[9] (Id. at 98-99.)

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[9] Petitioner was forty-six years old at the time of the murder. (See RT 9/9/83 at 99.)

Finally, Dr. Roy described Petitioner's marital and relationship history. (ROA 176 at 14-17.) He noted that Petitioner's first marriage, which produced six children, ended after Petitioner found his wife in bed with another man. (Id. at 14.) He described relationships Petitioner maintained with other women with whom he fathered children, prior to his relationship with Susan. (Id. at 14-15.) Petitioner told Dr. Roy that Susan had affairs with other men, drank alcohol and used drugs. (Id. at 15-16.) In March 1987, just months before the instant offense, Petitioner married another woman with whom he had fathered two children.[10] (Id. at 16.)

In addition to Dr. Roy, Petitioner presented testimony from his prison counselor, Juan Gonzales. (RT 9/9/93 at 12-19.) Gonzales testified that Petitioner was classified at the lowest possible custody level for a death-row inmate. (Id. at 15-16, 17.) He also testified that Petitioner maintained close contact with family members and was a compliant inmate who was not disruptive. (Id. at 14, 15.)

The State presented testimony from psychiatrist Eva B. McCullars. Dr. McCullars concluded that Petitioner met the criteria for anti-social personality disorder on Axis 1 because:

> He has not sustained consistent work and changed jobs repeatedly. He has failed to conform to social norms with respect to lawful

[10] According to the presentence report, Petitioner's second wife was living in South Dakota at the time of the trial. (ROA 108 at 2.)

> behavior. He appears to have no regard for the truth in that he minimizes and omits factual information. He has not sustained a totally monogamous relationship, and he show [sic] remorse in relation to the murder; he, in fact, claims innocence.

(ROA 186 at 6; RT 9/9/93 at 117, 121-23, 124, 143, 55.) Dr. McCullars reported that Petitioner told her he had been transporting drugs the night of the crime, which he claimed to have delivered to a police vehicle, and then returned to Banning, where he was arrested.[11] (ROA 186 at 4.)

Citing Strickland, among other cases, the PCR court concluded that Petitioner had not established prejudice. It stated in part that:

> It was pretty much apparent that the defendant's family was not going to be the source of much mitigating testimony.
>
> As to his claims that he is a good and a caring father and his love for his children, the court was fully aware of this. However, this court was also aware of his aggressive and tyrannically possessive attitude concerning his "family", which included Susan Hill.

(ROA 202 at 5.) Further, the PCR court rejected, and stated that it would have rejected at sentencing, the suggestion that Petitioner had borderline personality

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[11] Petitioner made a similar statement to the presentence report writer. (ROA 108 at 3.)

disorder. (Id.) The court accepted as true that Petitioner had anti-social personality disorder and that he was poorly adjusted to living in society, but found "nothing in his makeup now, nor in the opinion of the experts was there anything at the time of the offenses, which lessened his ability to differentiate right from wrong or to conform his actions with the law." (Id.) It noted that Roberson had not seen anything in Petitioner's personality makeup or his actions that made him suspect that a mental examination would be fruitful. (Id.) The court further stated "[t]here may have been no mental examination at the time of sentencing, but the recent examination does not support any suggestion that one would have altered the sentence imposed." (Id. at 6.) The court stated it was aware of certain matters in mitigation at the time of sentencing, namely, that Petitioner had been a good or even model prisoner while incarcerated in Yuma and later as an inmate at the Arizona Department of Corrections. (Id.) Finally, the court stated that, while it might not have been aware of all of the mitigating circumstances claimed by Petitioner, it only accepted certain ones "as being at all evident." (Id.) It found that Petitioner's medical condition and close family ties were not mitigating and, to the extent they might be, were insufficient to affect the sentence. (Id.) It found that lack of education had been shown, but not a lack of intelligence. (Id.) The court concluded that Petitioner was "experienced, street smart, and [was] wise enough to plan carefully and act forcibly for his own well being" and that "[n]one" of the remaining matters were sufficient to mitiate the sentence imposed. (Id.) The Arizona Supreme Court summarily dismissed Petitioner's petition for review. (ROA 236.)

Performance

A petitioner claiming ineffective assistance "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Strickland, 466 U.S. at 690. Further, the petitioner must show that "counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." Id. at 687. The performance inquiry assesses whether counsel's assistance was reasonable considering all the circumstances. Id. at 688-89. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689. For instance, counsel's performance is evaluated by what reasonable counsel would have done at that time, including an evaluation of state law sentencing strategies. See Siripons v. Calderon, 35 F.3d 1308, 1315 (9th Cir. 1994). A petitioner must overcome the presumption that under the circumstances, the challenged action might be considered sound trial strategy. Id. "A court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690.

Counsel has a duty to conduct a reasonable investigation or to make a reasonable decision that makes particular investigation unnecessary. Id. The

failure to adequately investigate and present mitigating evidence can constitute deficient performance. See Wiggins v. Smith, 539 U.S. 510 (2003). A reasonable mitigation investigation involves not only the search for good character evidence but also evidence that may demonstrate that the criminal act was attributable to a disadvantaged background or to emotional and mental problem. Boyde v. California, 494 U.S. 370, 382 (1990). Thus, deficient performance has been found where trial counsel failed to investigate and present substantial mitigating evidence regarding family background, borderline mental retardation and exemplary behavior in prison when potential rebuttal evidence was minimal. Williams (Terry) v. Taylor, 529 U.S. 362 (2000). In addition, counsel who is on notice of a serious mental health issue and does not complete a reasonable mitigation investigation or provide a reasonable tactical justification performs deficiently. See Caro v. Woodford, 280 F.3d 1247, 1254 (9th Cir. 2002); Evans v. Lewis, 855 F.2d 631, 637 (9th Cir. 1988). When counsel's investigation is being assessed for reasonableness, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Strickland, 46 U.S. at 691.

Petitioner alleges that Roberson rendered ineffective assistance by failing to adequately investigate and present non-statutory mitigation at sentencing. (Dkt. 18 at 66.) He alleges that Roberson performed deficiently by failing to conduct any investigation for mitigating evidence other than to interview Petitioner, and by failing to seek the appointment of a psychologist or other expert to

evaluate Petitioner and to show the impact of physical and emotional experiences on Petitioner that may have been mitigating. (Id.) Specifically, Petitioner faults counsel for not urging in mitigation his dysfunctional blended family, childhood sexual abuse, deficient education and low-average intelligence, diabetes, physical disability, employment history, and marital and relationship history.

In Caro v. Woodford, 280 F.3d at 1254, the Ninth Circuit held that counsel performed deficiently when counsel was on notice of a serious mental health issue but did not complete a reasonable mitigation investigation or provide a reasonable tactical justification for not conducting an investigation. In this case, the record reflects that Petitioner had no history of either mental impairment or treatment. (ROA 176 at 17.) In addition, Roberson testified that he spent a significant amount of time with Petitioner reviewing the case and discussing mitigation but that he detected no indication that Petitioner suffered from any mental impairment or disorder. (RT 9/9/93 at 37, 39-40, 57-59, 64, 66, 67-68.) On this record, the Court does not conclude that Roberson can be faulted for failing to seek appointment of a mental health expert. See Miniel v. Cockrell, 339 F.3d 331, 345 (5th Cir. 2003) (counsel not deficient where there was nothing in the record or counsel's interactions with defendant to alert counsel to potential mental problems); cf. Turner v. Calderson, 281 F.3d 851, 892 (9th Cir. 2002) (where defense counsel on notice that defendant may be mentally impaired, counsel's failure to investigate mental condition as mitigating factor without supporting strategic reason is deficient); Evans, 855

F.2d at 636-37 (counsel performed deficiently where he failed to investigate petitioner's documented history of mental problems).

Further, there is no evidence that Petitioner gave Roberson reason to suspect he had been abused as a child or raised in a dysfunctional environment. Indeed, with respect to the alleged sexual abuse, Dr. Roy testified it was his impression that he was the first person to whom Petitioner had ever disclosed this information (RT 9/9/93 at 80). See Jones v. Delo, 56 F.3d 878, 886 (8th Cir. 1995) (counsel not deficient for failing to interview family members for background information when petitioner did not provide counsel with information about his family that would enable counsel to contact them and conduct a fuller investigation); Rutherford v. Crosby, 385 F.3d 1300, 1312 (11th Cir. 2004) (counsel not deficient for failing to further investigate petitioner's family background where defendant failed to provide family names and information and asked family members not to meet with counsel; Hicks v. Collins, 384 F.3d 204, 217-18 (6th Cir. 2004) (counsel not deficient for not introducing evidence regarding defendant's sexual abuse and background never disclosed to counsel). Although Roberson conceded he did not seek appointment of a mental health expert to meet with Petitioner to investigate Petitioner's background and hunt for mitigation evidence, he also testified that he had observed no indication that a mental health evaluation was warranted (RT 9/9/93 at 39-40, 64, 67-68) and that it had not been the practice at the time, absent some indication of mental impairment or disorder, to request

or be granted a mental health expert in every capital case (id. at 77).

Roberson conceded he did not seek school, employment or medical records to evaluate any potential mitigation therein. It also appears there was no strategic or tactical reason for not interviewing other family members for potential mitigation. Nonetheless, on this record, although Roberson could (and arguably should) have conducted additional investigation for potential mitigation, there is no evidence that Petitioner provided leads to Roberson concerning potential mitigation from, for example, family members who had not testified at the trial, former employers, physicians or the like, or that Roberson failed or refused to follow up on any leads that Petitioner did provide.[12] Roberson testified, and Petitioner did not challenge, that Roberson spent significant time discussing potential mitigation with Petitioner but that Petitioner was unable to provide him with names of potential mitigation witnesses. Further, Roberson testified that, at the time of Petitioner's trial, it was not standard defense practice to seek psychological assistance in capital cases absent some indication of mental impairment or disorder. This Court concludes, in light of this record, that Petitioner's counsel did not perform deficiently by failing to conduct additional investigation or by failing to present additional mitigation at sentencing. However, even if counsel's representation fell below

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[12] Further, Petitioner was tried several years after he had last been employed.

professional norms, the Court concludes that Petitioner was not prejudiced.

Prejudice

The prejudice component of the Strickland test focuses on whether counsel's deficient performance renders the result of the sentencing unreliable or the proceeding fundamentally unfair. Lockhart v. Fretwell, 506 U.S. 364, 372 (1993). Thus, under this prong, "an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To demonstrate prejudice, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. Discussing the prejudice standard, the Supreme Court stated in Strickland that:

The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. . . . When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer--including an appellate court, to the extent it independently reweighs the evidence would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge . . . . Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Id. at 695-96. The additional mitigation evidence must do more than barely alter the sentencing profile already presented to the sentencing judge. Id. at 699-700.

In evaluating prejudice, a court is "asked to imagine what the effect might have been upon a sentencing judge, who was following the law, especially one who had heard the testimony at trial. Mitigating evidence might well have one effect on the sentencing judge, without having the same effect on a different judicial officer." Smith v. Lewis, 140 F.3d 1263, 1270

(9th Cir. 1998). Thus, this Court must consider Arizona law regarding the weighing of aggravating and mitigating circumstances before it can determine whether the result of the sentencing proceeding would have been different if the additional mitigation had been proffered. Id. at 1271. At the time Petitioner was sentenced, Arizona's death penalty statute required a judge to impose a death sentence if one or more aggravating circumstances were proven beyond a reasonable doubt and the mitigation established by a preponderance of the evidence was not sufficiently substantial to call for leniency. A.R.S. § 13-703(E) (superseded).[13]

During his state PCR, Petitioner presented additional evidence of mitigation to support his claim that he was prejudiced by trial counsel's failure to adequately investigate and present such evidence. The state court determined that even considering the new evidence, Petitioner had failed to show a reasonable probability that his sentence would have been different. The court concluded that all of the proffered mitigation remained insufficient to outweigh the established aggravation. This Court agrees.

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[13] In Ring v. Arizona, 536 U.S. 584 (2002), the Supreme Court ruled that a sentencing judge sitting without a jury, may not find an aggravating factor necessary for imposition of the death penalty, invalidating this aspect of Arizona's capital sentencing scheme. In Schriro v. Summerlin, 124 S.Ct. 2519 (2004), the Court held that Ring does not apply retroactively to cases, such as Petitioner's, that were already final on direct review at the time Ring was decided.

In the PCR evidentiary hearing, Petitioner presented evidence from Dr. Roy regarding Petitioner's diabetes, physical disability, difficult childhood, childhood sexual abuse, substandard education and low intelligence, work history, and marital and relationship history as additional mitigation that could have been developed and presented at sentencing. Dr. Roy found that Petitioner had a borderline personality disorder with dependent features that influenced his selection of intimate companions who betrayed him but upon whom he also depended.

Under Arizona law, major mental impairments, such as brain damage or mental illness, carry far more mitigating weight than does a personality disorder because such impairments may demonstrate a defendant's inability to control his conduct or appreciate the difference between right and wrong. See State v. Doss, 116 Ariz. 156, 163, 568 P.2d 1054, 1061 (1977); State v. Richmond, 114 Ariz. 186, 197-98, 560 P.2d 41, 52-53 (1976). While it may have some mitigating value, the Arizona Supreme Court has held that a personality disorder is entitled to meaningful weight only if it had some effect on a defendant's capacity to conform his conduct to the law's requirements or significantly influenced his behavior at the time of the crime. See State v. Hoskins, 199 Ariz. 127, 152, 14 P.3d 997, 1022 (2000) (significant mitigation established if defendant shows causal connection between personality disorder and commission of the crime); State v. Vickers, 129 Ariz. 506, 515, 633 P.2d 315, 324 (1981). Similarly, the Arizona courts have held that although a difficult family background, including childhood abuse, maybe

relevant mitigation at the penalty phase, dysfunctional family history is entitled to significant mitigating weight only if it had a causal connection to the offense-related conduct. See State v. Mann, 188 Ariz. 220, 231, 934 P.2d 784, 795 (1997); State v. Towery, 186 Ariz. 168, 189, 920 P.2d 290, 311 (1996); State v. Stuard, 176 Ariz. 589, 608 n. 12, 863 P.2d 881, 900 n. 12 (1993). Further, the weight accorded a defendant's difficult family background may be discounted for an adult offender because adults are considered to have greater responsibility for their actions. Gretzler, 135 Ariz. at 58, 659 P.2d at 16.

At the PCR evidentiary hearing, Petitioner's and the State's experts each concluded that Petitioner had a personality disorder, albeit not the same disorder. There was no evidence that Petitioner suffered from a major mental impairment at the time of the offense or that his ability to conform his conduct to the law's requirements or to know the difference between right from wrong was significantly impaired. Petitioner did proffer evidence that he had an impoverished childhood in a segregated community, childhood sexual abuse and was treated unfairly as a child by his father and his stepmother. However, he did not establish a causal connection between this background and his offense-related conduct. Further, Petitioner was over the age of forty at the time of the offense, and those events had occurred many years before. Petitioner also points to a substandard education, low average intelligence, diabetes and physical disability. Again, Petitioner fails to show any connection between these factors and the crime. Finally, Petitioner points to a somewhat stormy marital and relationship history, which is not

persuasive in light of the impetus for the crime. Consequently, this evidence would have been accorded little mitigating weight, as the PCR court indicated, if counsel had presented it at sentencing.

The Court concludes that it is not reasonably probable that the evidence proffered by Petitioner to show he was prejudiced by trial counsel's alleged failure to investigate and present mitigation is sufficient to undermine confidence in the outcome. While not insignificant, this evidence is not so substantial as to outweigh the aggravating factors--that Petitioner procured commission of the crime by the promise of something of pecuniary value and that the murder was especially heinous, cruel and depraved. Strong circumstantial evidence supports both factors. Petitioner was the only one of the defendants who had previously been to the Hills' home and who knew the Hills; Petitioner had driven Susan to the home months before. Further, Susan had warned Petitioner that Sterleen had obtained a peace bond and that he was not welcome at the home. The shotgun with which the Hills were shot was shown to have been in Petitioner's possession in Banning prior to the crime. Further, two of Petitioner's sons saw him load the gun into his car after he told one of them that he was going to Yuma to look for Susan. In the attack, the intruders demanded drugs and money and ransacked the Hills' bedroom, before shooting them. Whatever Petitioner's purpose in instigating the intrusion, this supports an inference that he procured the assistance of his accomplices by promising them valuables located in the house. As both the trial and supreme court noted, Petitioner knew the Hills and

knew they were not drug traffickers, while his accomplices did not, yet the accomplices repeatedly demanded money and drugs from the Hills. Further, following the intrusion, the two elderly Hills were forced to lie face down on their bedroom floor, where they were tied up, and then senselessly shot. The Hills were rendered wholly unable to resist the armed intruders, and Sterleen would have heard, as did Ralph, the statement about getting their teenage son, Sterleen then witnessed her husband being shot, followed by the pumping of the shotgun, and the undoubted realization that she was next. Robinson, 165 Ariz. at 61, 796 P.2d at 863. These facts support that the murder was especially cruel, heinous or depraved. In opposition to this evidence, Petitioner points to events from his childhood, with no demonstrated connection to his role in the murder, or to circumstances that carry relatively little mitigating weight. The Court concludes that, after considering the totality of mitigation evidence presented at sentencing and during the PCR, there is no reasonable probability his sentence would have been different. Accordingly, Petition is not entitled to relief on this claim.

Evidentiary Hearing

Petitioner argues, if the Court is not persuaded that Roberson performed deficiently in preparing for sentencing, it should hold an evidentiary hearing "to determine whether Roberson's conduct fell below an objective standard of reasonableness." (Dkt. 46 at 19, see also dkt. 41 at 51.) He also argues in his reply that a causal connection exists between the mitigating

events in Petitioner's background and the crime and that, therefore, the proffered mitigation is relevant to the prejudice inquiry. (Dkt. 46 at 22.) He asks that, if the Court is not persuaded, it hold an evidentiary hearing "to further explore any causal connection between the mitigating evidence presented in the amended petition and the crime at issue." (Id.)

The decision whether to grant an evidentiary haring when there are material facts in dispute is generally at the discretion of the district court judge. See Townsend v. Sain, 372 U.S. 293, 312, 318 I(1963), overruled in part by Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992); Baja v. Ducharme, 187 F.3d 1075, 1077 (9th Cir. 1999); Rule 8, Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254 (providing that the district court judge shall determine if an evidentiary hearing is required). In Townsend, the Supreme Court held that an evidentiary haring is required). In Townsend, the Supreme Court held that an evidentiary hearing is mandatory when facts are in dispute if: (1) the petitioner "alleges facts which if proved, would entitle him to relief," and (2) the state court has not, "after a full hearing reliably found the relevant facts." 372 U.S. 293, 312-13 (1963), overruled in part by Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). In addition, the Court established six circumstances under which there is presumptively no "full and fair hearing at the state level:

> (1) the merits of the factual dispute were not resolved by the record as a whole;
> (2) the state factual determination is not fairly supported by the record as a whole;

> (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing.
> (4) there is a substantial allegation of newly discovered evidence;
> (5) the material facts were not adequately developed at the state-court hearing;
> (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

See id. at 313. In any other case in which the facts are in dispute, the district court judge "has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim." Id. at 318 (noting that if a "habeas applicant was afforded a full and fair hearing by the state court resulting in reliable findings, [the judge] may, and ordinarily should, accept the facts as found in the hearing").

In this case, Petitioner was granted an evidentiary hearing by the state courts on his IAC claims. In addition, Petitioner was granted the assistance of a psychologist. Petitioner has not alleged nor shown how the state court's fact finding process was deficient. The Court finds that Petitioner received a full and fair hearing in state court and that a federal evidentiary hearing is neither required nor necessary.

CONCLUSION

The Court concludes that Petitioner is not entitled to habeas relief on Claim 5 because the claim is procedurally barred. In addition, the Court concludes that Claims 6-B, 6-C, 7 and 8 lack merit. Finally, the Court finds that Petitioner is not entitled to an evidentiary hearing.

Based on the foregoing,

IT IS ORDERED that Petitioner's Amended Petition for Writ of Habeas Corpus (Dkt. 17) is **DENIED WITH PREJUDICE**. The Clerk of Court shall enter judgment accordingly.

IT IS FURTHER ORDERED that the Clerk of Court forward a copy of this Order to Noel Dessaint, Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix, AZ 85007-3329.

DATED this 17 day of March, 2005.

s/_____
JAMES A. TEILBORG
United States District Judge

SUPREME COURT OF ARIZONA

State of Arizona,	)	
Appellee,	)	No. CR-88-0002-AP
	)	CR-88-0003-AP
v.	)	
	)	CV-96-00669-JAT
Fred Lawrence Robinson, and	)	
Theodore Washington,	)	
Appellants.	)	
	)	

Robert K. Corbin, Atty. Gen. by Barbara A. Jarrett, Phoenix, for appellee.

Roberson & Shelley by Robert J. Roberson, Yuma, for appellant Robinson.

Robert C. Clarke, Yuma, for appellant Washington

OPINION

ROLL, Court of Appeals Judge.

Fred Lawrence Robinson and Theodore Washington, along with co-defendant Jimmy Lee Mathers, were convicted of first-degree murder, attempted first-degree murder, two counts of aggravated assault, first-degree burglary, and armed robbery. All three defendants received death sentences for the murder and various terms of imprisonment for the remaining offenses.[FN1] This opinion addresses the appeals of Robinson and

Washington. This court has jurisdiction pursuant to Ariz. Const. art. 6, § 5(3), and A.R.S. §§ 13-4031, 13-4033, and 13-4035. For the reasons set forth below, we affirm the respective convictions and sentences.

> FN1. In addition to the death sentence for murder (count one), all three defendants were sentenced to aggravated sentences of 21 years' imprisonment for attempted murder (count two), 15 years' imprisonment for both aggravated assaults (counts three and four), 15 years' imprisonment for first-degree burglary (count five), and 21 years' imprisonment for armed robbery (count six). The sentence on count two was ordered to run consecutively to the sentence in count one and concurrently with the sentences for counts three and four. Counts five and six were ordered to run concurrently with each other but consecutively to the sentence for count two.

FACTS

Fred Robinson met Susan Hill in 1972 through a motorcycle club. Eventually Susan became Robinson's common-law wife. The couple parented three children, Andre, Truman, and Misha. They had lived together in a stormy relationship punctuated by periodic separations. Robinson verbally and physically abused Susan.

In February 1984, Susan left Robinson to go and live with her sister in Pacoima, California. Robinson confronted Susan in Pacoima and eventually forced her

to return with him to his Banning, California residence. He told Susan that if she did not return with him, he would take her out to the desert and dispose of her where no one would ever find her.

In June 1986, Susan was staying with another sister in North Hollywood, California. Two men forced their way into the house and tied Susan's sister's and niece's hands together, all the while exhibiting small handguns. Susan hid in a closet. Soon she heard Robinson talking and then heard her sister ask her to come out. When Susan stepped from the closet, Robinson began to unbuckle a knife from his belt. Susan begged him not to take out the knife. Robinson told Susan that he had travelled to North Hollywood intending to kill her and her sister but had changed his mind because of the niece's presence. Susan then returned to Banning with Robinson.

In November 1986, without Robinson's knowledge, Susan went to Philadelphia, Pennsylvania, to live with her aunt and uncle. When Susan mailed her children Christmas presents with a Philadelphia return address, Robinson discovered her whereabouts. In January 1987, Robinson went to Philadelphia to retrieve Susan. Jimmy Lee Mathers accompanied him on the trip. Robinson used a ruse to lure Susan to a train station. He then grabbed her and took her to California. Before Susan left Philadelphia, she told her aunt and uncle that something would happen to them if Susan did not return to Banning with Robinson.

Upon returning to California, Susan stayed with Robinson for approximately three weeks. In February

1987, Susan persuaded Robinson to permit her to go to her father's house in Yuma, Arizona, for one week. Her father, Ralph Hill, Sr., and stepmother, Sterleen Hill, lived in Yuma with their teenage son, LeSean. The Hills were well acquainted with Robinson. Susan lived at the Hill home nearly three weeks, during which time Robinson telephoned at least twice. Sterleen Hill told Susan to inform Robinson that Sterleen had obtained a peace bond against him and that Robinson should not enter upon their property. In a letter, Susan informed Robinson of her stepmother's statement.

Susan then went to Pacoima, California, to stay with her grandmother, then to Pasadena, California, to live with a sister. She did not notify Robinson that she had moved out of the Hills' home.

On June 8, 1987, in Banning, Robinson's son Andre was present when Robinson, Mathers, and Theodore Washington discussed going to Yuma. Washington was wearing a red bandana. Mathers told Andre that the trio was "going to Arizona to take care of some business." Robinson and Mathers put two handguns and a shotgun in Robinson's car. Robinson told Andre that he was going to Arizona to see if Susan was there. Robinson and Mathers left the residence travelling toward Washington's house. Washington, Robinson, and Mathers were last seen around 6:00 p.m. embarking on their trip in Robinson's tan Chevette.

Banning, California is approximately 175 miles from Yuma. Sometime around 11:30 p.m. that evening, Sterleen Hill heard sounds outside the Hills' Yuma home. She told LeSean to investigate but he saw no

one. About 11:45 p.m., someone knocked on the door. When LeSean opened the door, a man with a deep voice identified himself as James and told LeSean that he had some money for Ralph Hill. When LeSean opened the door to accept the money, the man attempted to grab LeSean. LeSean pulled away, ran through the house past his parents' bedroom, and escaped through another door. Ralph and Sterleen Hill emerged from the bedroom as a result of the commotion and heard voices shout, "We're narcotics agents. We want the dope and the money." Ralph Hill could see shadows of two people but could not identify their voices. The two intruders forced Ralph and Sterleen to return to the bedroom and lie face down on the floor. Someone kept saying, "We know you got the money and the dope." During this time a black man with a red bandana and a moustache "screwed" a handgun into Ralph's ear, then ransacked the drawers and closet. A second person stood over Ralph and Sterleen. Someone said, "We better get the kid." Ralph's and Sterleen's hands were tied behind their backs and their feet were bound. After Sterleen requested that her feet be covered up, Ralph was rendered unconscious.

While events unfolded in the Hill home, LeSean telephoned the police from a neighbor's house. As LeSean and the neighbor were returning to the Hills' home, they observed a tan Chevette speeding away from the vicinity, pursued by a sheriff's deputy in a marked police vehicle. This deputy was responding to LeSean's phone call. Before arriving at the Hills' home, however, the deputy observed the tan Chevette, travelling without its headlights on, in the vicinity of

the Hills' home. When the officer turned on his emergency equipment and told the driver to stop, the driver smiled at the officer and fled. The officer gave chase and eventually stopped the fleeing vehicle. Robinson was driving the Chevette. An empty shotgun shell box, a red bandana, clothing and sheets, and Mathers' duffle bag were inside the vehicle.

Ultimately, law enforcement officers entered the Hills' home and found that Ralph and Sterleen Hill had been shot at close range with a .12-gauge shotgun. Ralph Hill survived, although he suffered massive injuries, including the loss of an eye. Sterleen Hill died as a result of loss of blood from the shotgun wound. The officers searched the neighborhood and discovered assorted .38-caliber cartridges in some bushes and a trench coat with the name Eric Robinson on a piece of paper in the pocket. A neighbor of the Hills found a loaded cylinder to a .38-caliber handgun in her mailbox. A sterling silver lighter case and a watch were also found in the neighborhood. These items had been taken from the Hills' home, as was a small locked box containing a gold watch and some coins. A shotgun was found in some weeds close to a gas valve line. A criminalist determined that spent shotgun shells found at or near the murder scene had been fired by the shotgun found near the gas valve line. Andre Robinson identified this shotgun as one owned by his father, and Truman Robinson identified it as the shotgun his father wrapped in a pink and white sheet and placed in the tan Chevette on June 8, 1987.

At approximately 2:00 a.m. on June 9, 1987, Washington placed a telephone call to his girlfriend,

Barbara Bryant. He gave her a Yuma telephone number at which he could be reached. Later, Washington called a second time and gave her a second Yuma telephone number. Bryant phoned Washington a total of three times at Yuma telephone numbers. During one of these conversations, Washington told her that he was stranded in Arizona. One phone number at which Bryant contacted Washington was assigned to the Yuma bus station. Washington returned to Banning by bus.

Susan Hill was notified of the shootings and travelled from Pasadena to Yuma with four sisters, a brother, and a brother-in-law. While en route, she picked up her children in Banning. On the trip to Yuma, they travelled through Coachella, California, where they observed Mathers walking toward Banning. Andre told Susan that Mathers had been with Robinson when Robinson left Banning the day before. The family members confronted Mathers, who stated that he was coming from Arizona and that Robinson was in Yuma. When the group told Mathers that they were going to make a citizens' arrest, Mathers fled into a nearby grocery store. The police were notified and took him into custody.

PROCEDURAL HISTORY

Robinson, Mathers, and Washington were indicted for first-degree murder, attempted first-degree murder, two counts of aggravated assault, first-degree burglary, and armed robbery. The matter was tried to a jury, and all three were found guilty on all counts. Following an aggravation-mitigation hearing, the trial judge

sentenced all three to death.

ISSUES ON APPEAL

On appeal, Robinson and Washington argue that error occurred when (1) prior bad act evidence was admitted, (2) hearsay evidence regarding the murder weapon was admitted, and (3) the state was permitted to introduce hearsay evidence from a law enforcement officer to impeach the testimony of a friend of Washington, and (4) the trial court erroneously restricted the cross-examination of Barbara Bryant. Both Robinson and Washington argue that their death sentences should be vacated because (1) the killing was not committed for pecuniary gain, (2) the killing was neither depraved nor heinous, nor was it cruel, and (3) a further hearing was required regarding the presence of *Tison* [FN2] and *Enmund* [FN3] considerations. We also consider whether the death sentences imposed in this case are proportional to those imposed in similar cases.

FN2. *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987).

FN3. *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

Evidentiary Rulings

A. Prior Bad Act Evidence

Robinson and Washington argue that the trial court erred in admitting evidence of Robinson's trips to Philadelphia and North Hollywood in order to locate

Susan and compel her return to Banning. Our standard of review for the admission or exclusion of evidence is abuse of discretion. *Throop v. F.E. Young and Co.*, 94 Ariz. 146, 155, 382 P.2d 560, 566 (1963); *State v. Stanley*, 156 Ariz. 492, 494, 753 P.2d 182, 184 (App.1988).

Rule 404(b) permits introduction of prior bad acts as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Ariz.R.Evid. 404(b), 17A A.R.S. Prior bad act evidence need not necessarily constitute evidence of a particular crime. *State v. Jeffers*, 135 Ariz. 404, 419, 661 P.2d 1105, 1120, *cert. denied*, 464 U.S. 865, 104 S.Ct. 199, 78 L.Ed.2d 174 (1983).

The North Hollywood incident was admissible to prove Robinson's modus operandi and to prove that Robinson sent Washington to the Hill home as part of a scheme to retrieve Susan. It is true that Washington was not with Robinson when he dispatched two individuals to Susan's North Hollywood residence. However, since the evidence was clearly admissible against Robinson, the absence of Washington diminishes the prejudicial impact of the North Hollywood episode as to him.

The Philadelphia incident was also admissible to prove Robinson's modus operandi. *State v. Harding*, 141 Ariz. 492, 498, 687 P.2d 1247, 1252 (1984). Robinson's trip to Philadelphia occurred only five months before the assault on the Hills' home. This trip was similar to the North Hollywood incident inasmuch as it involved Robinson going to extraordinary lengths to compel Susan to return to him. Finally, both trips were

admissible against Robinson as motive evidence. In this regard, they both demonstrate Robinson's obsession with Susan coupled with a proclivity to go to extraordinary lengths to possess her. *Jeffers*, 135 Ariz. at 419, 661 P.2d at 1120.

As an alternative to complete exclusion of this evidence, Washington suggests that his trial should have been severed from that of Robinson, thereby permitting the state to introduce the Philadelphia and North Hollywood evidence against Robinson. However, we note that the trial court gave a limiting instruction when this evidence was presented. This adequately protected Washington. *State v. Canedo*, 125 Ariz. 197, 200, 608 P.2d 774, 777 (1980).

We find no error on this ground.

B. Police Report Evidence

Defendants argue that the trial court erred in admitting hearsay evidence that the shotgun used in the slaying had been reported missing. The state asserts that it introduced this evidence in order to place the shotgun in Banning.

Over defense objection, the state had a law enforcement officer relate the contents of the report on the missing shotgun, that is, that on January 20, 1987, a Banning resident reported that his .12-gauge pump shotgun, Savage Model No. 69RXL, Serial No. E437931, was missing. The trial court permitted this evidence to be introduced because it was a routine report, made prior to the crime, and did not implicate

the defendants. Our standard of review regarding admission of this evidence is abuse of discretion. *Throop, supra; Stanley, supra.*

The state argues this report was admissible under Rule 803(8)(B), Ariz.R.Evid., 17A A.R.S. Defendants correctly note, however, that the language of Rule 803(8)(B) excludes criminal cases where matters are observed by police officers and other law enforcement personnel. Nevertheless, the testimony was admissible because it was not offered to prove the truth of the report, but to establish the geographical location of the shotgun as being Banning, California. Moreover, the significance of this hearsay evidence, placing the shotgun in Banning five months before it was used to shoot Sterleen and Ralph Hill, was vastly diminished by other evidence directly linking Robinson and Washington to the shotgun.

Defendants also argue that evidence of the disappearance of the shotgun tended to point to one or both of the defendants as thieves or receivers of stolen property. Realistically, any prejudice against the defendants arising from this evidence was minimal in view of the egregious conduct with which the defendants were charged. Any error was harmless beyond a reasonable doubt. *Delaware v. Van Arsdall,* 475 U.S. 673, 684, 106 S.Ct. 1431, 1438, 89 L.Ed.2d 674, 686 (1986).

Cross-Examination of Barbara Bryant

Robinson and Washington argue that the trial court erred in limiting cross-examination of Washington's

girlfriend, Barbara Bryant. The scope of cross-examination is committed to the sound discretion of the trial court. *State v. Smith,* 138 Ariz. 79, 81, 673 P.2d 17, 19 (1983), *cert. denied,* 465 U.S. 1074, 104 S.Ct. 1429, 79 L.Ed.2d 753 (1984).

During direct examination, Bryant testified that she received telephone calls from Washington in the early morning hours of June 9, 1987, that she returned Washington's telephone calls, and that during one such conversation, Washington stated that he was stranded in Arizona.

During cross-examination, Washington's attorney attempted to elicit from Bryant the remainder of her conversation with Washington, but the trial court sustained the prosecutor's objections on hearsay grounds. When the trial court requested an offer of proof as to the evidence sought to be elicited, Robinson's attorney stated that Bryant had previously told a law enforcement officer that Washington had not asked her to come pick him up. This statement, argues Robinson, was inconsistent with her trial testimony that Washington said he was stranded. Robinson did elicit from Bryant that Washington frequently became stranded after partying with other motorcycle club members. Ultimately, the trial court restricted Washington's questions of Bryant on the ground that the probative value of the proffered evidence was outweighed by its prejudicial impact and, in any event, Bryant's trial testimony was not inconsistent with her prior statements.

The trial court did not abuse its discretion. Assuming

arguendo that the prosecutor presented inadmissible hearsay against Robinson by eliciting from Bryant that Washington, during one of his telephone calls, said that he was stranded in Arizona, Robinson has failed to demonstrate prejudice. Bryant's brief summary of what Washington said to her made no reference to Robinson, and was admissible against Washington. Bryant's telephone billing reflects long-distance calls to Yuma consistent with the times Bryant said she spoke with Washington. Washington's offer of proof set forth no specific exculpatory information that he hoped to elicit. In addition, Bryant did testify that it was not unusual for Washington to become stranded during innocuous activities. Any error was harmless beyond a reasonable doubt. *Van Arsdall, supra.*

Impeachment of Joseph Dixon

Washington and Robinson argue that the trial court erred when it permitted the prosecutor to impeach Joseph Dixon with prior allegedly inconsistent statements. The standard of review for the trial court's ruling is abuse of discretion. *State v. Woods*, 141 Ariz. 446, 454, 687 P.2d 1201, 1208 (1984).

During the investigation, Dixon told law enforcement officers that on June 8, 1987, he saw Washington, Robinson, and Mathers together, and Washington was wearing a bandana. At trial, Dixon testified that he could not recall whether it was Mathers and Robinson that he saw together or Mathers and Washington. He also testified that he did not recall who had been wearing the bandana. The trial court permitted the prosecutor to question the witness regarding his prior

statements and to call the law enforcement officer to whom Dixon made the earlier statements. Defendants argue that since Dixon only stated that he could no longer recall rather than denying that he made the statements, the statements were not inconsistent and impeachment should not have been permitted.

We disagree. Extrinsic evidence of Dixon's prior statements was introduced only after Dixon was given the opportunity to explain or deny the prior statements. Accordingly, impeachment with the extrinsic evidence was permissible. Rule 613(b), Ariz.R.Evid., 17A A.R.S. Impeachment of Dixon by the state was permissible even though Dixon was called as a witness by the state. Rule 607, Ariz.R.Evid., 17A A.R.S.; *State v. Sustaita,* 119 Ariz. 583, 587, 583 P.2d 239, 243 (1978). That Dixon claimed failure of memory rather than outright denying having made the earlier statements did not preclude impeachment. *United States v. Rogers,* 549 F.2d 490, 496 (8th Cir.1976), *cert. denied,* 431 U.S. 918, 97 S.Ct. 2182, 53 L.Ed.2d 229 (1977). In *Rogers,* the Eighth Circuit stated: "The trial judge should have considerable discretion to determine whether evasive answers are inconsistent with positive assertions of an extrajudicial nature previously given." *Id.* Dixon testified that he and the three defendants were good friends; that he, Robinson, and Mathers were members of a motorcycle club and Washington was a prospective member; that he had known Robinson for 14-15 years; and that he had lived with Robinson for four to five months. The trial judge stated that he did not know whether the witness was being evasive or was merely typical of many people with poor recollection.

The trial court did not abuse its discretion when it permitted the state to impeach Dixon with extrinsic evidence.

Death Sentences

The trial court determined that two aggravating circumstances applied to both Robinson and Washington. These factors are that the offense was committed in consideration for or in the expectation of anything of pecuniary value and the offense was committed in an especially heinous, cruel, or depraved manner. A.R.S. § 13-703(F)(5) and (6). The court also found that as to Robinson, the commission of the offense was procured by the payment or promise of payment of anything of pecuniary value. A.R.S. § 13-703(F)(4).

We must independently review the existence of aggravating and mitigating circumstances to determine if the death penalty was properly imposed. *State v. Walton,* 159 Ariz. 571, 586, 769 P.2d 1017, 1032, *cert. granted,* 493 U.S. 808, 110 S.Ct. 49, 107 L.Ed.2d 18 (1989); *State v. Beaty,* 158 Ariz. 232, 242, 762 P.2d 519, 529 (1988), *cert. denied,* 491 U.S. 910, 109 S.Ct. 3200, 105 L.Ed.2d 708 (1989).

A. Aggravating Circumstances

The state must prove the existence of aggravating circumstances beyond a reasonable doubt. A.R.S. § 13-703(C); *Walton, supra.*

1. *Promise of Payment*

The trial court found as an aggravating circumstance against Robinson that Robinson "procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value." A.R.S. § 13-703(F)(4).

During the aggravation-mitigation hearing, the state presented evidence of a post-arrest statement made by Washington to Major Ralph Ogden of the Yuma County Sheriff's Office. Washington said that Robinson planned the June 8, 1987 trip to the Hills' home, and Robinson told him that the Hill residence belonged to a cocaine trafficker. Robinson disclosed a plan to "take off" the cocaine dealer who lived at the house and to steal any cocaine and/or money present. Robinson said that "if things get rough, shoot 'em." Washington told the officer that Robinson did not announce this plan until Robinson, Washington, and Mathers arrived in Yuma. Washington's post-arrest statement was apparently considered by the trial court as evidence that Robinson had procured the slaying by promising Washington a pecuniary benefit.

An aggravation-mitigation hearing regarding the death sentence involves the same safeguards as a trial. A.R.S. § 13-703(C). That provision states in part:

> [T]he admissibility of information relevant to any of the aggravating circumstances ... shall be governed by the rules governing the admission of evidence at criminal trials.

These rules of evidence include the right of an accused to confront adverse witnesses as guaranteed by the sixth amendment. Also, as a matter of right, post-arrest statements by non-testifying co-defendants may not be considered against the accused. *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

In *Walton v. State,* 481 So.2d 1197 (Fla.1985), the Florida Supreme Court vacated a defendant's death sentence and remanded for further proceedings because the primary evidence introduced against Walton during the penalty phase of his trial consisted of post-arrest statements of his co-defendants. The fact that in Arizona the penalty phase is tried to a judge rather than to a jury does not cause statements otherwise in violation of the sixth amendment to become admissible.

We are therefore obligated to search the record in order to ascertain whether sufficient evidence exists apart from Washington's post-arrest statement to support the trial court's finding that Robinson procured the murder by the promise of anything of pecuniary value. Robinson provided the murder weapon and transported Washington to the home of his common-law wife's parents. There is no evidence that Washington knew the Hills or where they lived but for the guidance of Robinson. Once at the Hill home, Washington demanded drugs and/or money from the Hills. Even disregarding Washington's post-arrest statement implicating Robinson, the evidence supports the trial court's finding that Robinson procured the slaying through promises to Washington of pecuniary gain,

that is, the presence in the Hill home of drugs and/or money.

2. *Commission for Anything of Pecuniary Value*

The trial court found as an aggravating circumstance against Robinson and Washington that the offense was committed in the expectation of receiving something of pecuniary value. A.R.S. § 13-703(F)(5).

Prior to the slaying, the assailants demanded drugs and money from the Hills. Washington searched closets and drawers for valuables. A few items were stolen from the house, although most were later discovered abandoned in the neighborhood. Accordingly, the trial court's finding that Washington had a financial motive for participating in the murder is supported by the evidence. *State v. Gretzler,* 135 Ariz. 42, 49, 659 P.2d 1, 8, *cert. denied,* 461 U.S. 971, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983).

While Washington was motivated by greed, Robinson, on the other hand, suggests that any participation on his behalf was simply motivated by revenge, coupled with a desire to locate Susan. Nothing in the record even remotely suggests that the Hills were drug traffickers or that Robinson believed that they were. As between Robinson and Washington, only Robinson knew the Hills and their true status.

In *State v. Correll,* 148 Ariz. 468, 479, 715 P.2d 721, 732 (1986), this court held that to establish this factor, the evidence must show that the hope of financial gain supplied the impetus for the murder. *See also State v.*

Gillies (Gillies I), 135 Ariz. 500, 512, 662 P.2d 1007, 1019 (1983). There is no evidence that Robinson was motivated by the expectation of pecuniary gain. The trial court's finding on this factor as to Robinson is therefore set aside. However, the elimination of one aggravating factor does not mandate a remand to the trial court for resentencing when the record compels a finding on the issue as a matter of law. *Clemons v. Mississippi,* 494 U.S. 738, ----, 110 S.Ct. 1441, 1448, 108 L.Ed.2d 725, 737 (1990); *State v. Emery,* 141 Ariz. 549, 553, 688 P.2d 175, 179 (1984).

3. *Heinous, cruel, or depraved*

The trial court also found as an aggravating circumstance that the murder was committed in an especially heinous, cruel, or depraved manner. A.R.S. § 13-703(F)(6). Any one of these circumstances-heinous, cruel, or depraved-can constitute an aggravating circumstance. *State v. Libberton,* 141 Ariz. 132, 139, 685 P.2d 1284, 1291 (1984); *State v. Clark,* 126 Ariz. 428, 436, 616 P.2d 888, 896, *cert. denied,* 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980).

The terms "heinous" and "depraved" focus on the killer's state of mind and attitude at the time of the offense. *State v. Wallace,* 160 Ariz. 424, 773 P.2d 983 (1989); *Gretzler,* 135 Ariz. at 51, 659 P.2d at 12. Five factors can support a finding of a mental attitude which was heinous and depraved: (1) the apparent relishing of the murder by the killer, (2) the infliction of gratuitous violence on the victim beyond the murder itself, (3) needless mutilation, (4) senselessness of the crime, and (5) helplessness of the victim. *Wallace,* 160

Ariz. at 427, 773 P.2d at 986; *Gretzler*, 135 Ariz. at 51-52, 659 P.2d at 10-11.

As difficult as it may be to define depravity, the gangland-style action of forcing two elderly persons to lay face down on the floor, tying them up, then senselessly shooting them amounts to depraved conduct. See *State v. Roscoe*, 145 Ariz. 212, 226, 700 P.2d 1312, 1326, *cert. denied*, 471 U.S. 1094, 105 S.Ct. 2169, 85 L.Ed.2d 525 (1985).

Cruelty focuses upon the victim's pain and suffering. *Wallace, supra; Gretzler, supra*. Psychological pain may be the equivalent of the most severe physical torture. *Correll*, 148 Ariz. at 480, 715 P.2d at 733, *quoting State v. (Ricky Wayne) Tison*, 129 Ariz. 526, 543, 633 P.2d 335, 352 (1981), *cert. denied*, 459 U.S. 882, 103 S.Ct. 180, 74 L.Ed.2d 147 (1982). The evidence indicated that Sterleen Hill was startled by the sudden intrusion of two armed individuals in her home. She and her husband were bound and forced to lie face down on their bedroom floor while demands were made upon them to produce drugs and money. Being bound would have caused Sterleen great distress. *Correll*, 148 Ariz. at 480, 715 P.2d at 733. The court could infer that Sterleen was uncertain as to her ultimate fate. *State v. McCall*, 139 Ariz. 147, 161, 677 P.2d 920, 934 (1983), *cert. denied*, 467 U.S. 1220, 104 S.Ct. 2670, 81 L.Ed.2d 375 (1984). Because there was no evidence that she was rendered unconscious by a physical blow prior to being executed, she, like Ralph Hill, probably heard one of the intruders state that they should "get" the Hills' teenage son. Ralph Hill testified that he was then suddenly rendered

unconscious. The evidence supports the inference that his loss of consciousness resulted from being shot in the back with a .12-gauge shotgun. Sterleen Hill would have witnessed this. Being aware that Ralph had been shot, and undoubtedly realizing that she was next, supports a finding of mental suffering by Sterleen. *Correll*, 148 Ariz. at 480, 715 P.2d at 733; *McCall*, 139 Ariz. at 161, 677 P.2d at 934. Although the shots were fired in close proximity in time, because the shotgun was a pump shotgun, at least a short period of time must have elapsed between the time that Ralph Hill was wounded and Sterleen Hill was executed.

The record amply supports the trial court's conclusion that the murder was committed in an especially heinous, cruel, or depraved manner.

B. Mitigating Circumstances

In death penalty cases, this court is obligated to review the record to determine whether any mitigating circumstances outweigh aggravating circumstances. *State v. Stevens*, 158 Ariz. 595, 598, 764 P.2d 724, 727 (1988); *State v. Richmond (Richmond I)*, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976), *cert. denied*, 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1977).

Robinson offered no mitigating circumstances and we agree with the trial court that none exist.

Washington argues the presence of four mitigating circumstances. He contends that his intoxication, his minor role, his youthfulness, and his familial activities prior to the homicide all constitute mitigating

circumstances.

Intoxication can be a mitigating circumstance. A.R.S. § 13-703(G)(1); *State v. Gillies (Gillies II)*, 142 Ariz. 564, 571, 691 P.2d 655, 662 (1984), *cert. denied*, 470 U.S. 1059, 105 S.Ct. 1775, 84 L.Ed.2d 834 (1985). However, evidence of Washington's intoxication was sparse. There was no showing that his consumption of alcohol impaired him to any degree.

Washington maintains that his participation was minor. However, the state, during the aggravation-mitigation hearing, produced evidence of Washington's post-arrest statement. Washington said he was advised by Robinson prior to going to the Hills' home that the mission was to steal cocaine and money from a drug trafficker and that it might be necessary to kill the residents if difficulty was encountered. Evidence at trial showed that Washington carried a .38-caliber handgun into the Hills' home, helped ransack their home, and did nothing to prevent the killing of Sterleen and the shooting of Ralph. Washington was not a minor participant.

Washington argues that his youthfulness is a mitigating factor. On June 8, 1987, Washington was 27 years old. We have refused to find age as a mitigating circumstance in cases where the defendant was much younger than Washington. *See, e.g., State v. Walton*, 159 Ariz. 571, 589, 769 P.2d 1017, 1035, *cert. granted*, 493 U.S. 808, 110 S.Ct. 49, 107 L.Ed.2d 18 (1989) (age 20 not a mitigating factor); *State v. Gerlaugh*, 144 Ariz. 449, 460, 698 P.2d 694, 705 (1985) (age 19 not a mitigating factor); *State v. Clabourne*, 142 Ariz. 335,

348, 690 P.2d 54, 67 (1984) (age 20 not a mitigating factor); *State v. Gillies (Gillies I)*, 135 Ariz. 500, 513, 662 P.2d 1007, 1020 (1983) (age 20 not a mitigating factor). *But see State v. Valencia*, 132 Ariz. 248, 250, 645 P.2d 239, 241 (1982) (age 16 sufficiently young to establish mitigating factor). We agree with the trial court that Washington's age was not a mitigating factor.

Finally, Washington argues that prior to the slaying he was a single parent raising a young son. However, viewed in the overall context of this case, this is not such a mitigating circumstance as to require the vacating of the death sentence imposed against him.

We agree with the trial court's determination that no mitigating circumstances exist so as to warrant vacating either Robinson's or Washington's death sentences.

C. Enmund/Tison Hearing

Robinson and Washington argue that *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), and *Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), preclude imposition of the death sentence. In *Enmund*, the Supreme Court held that the eighth amendment is violated if the death penalty is imposed for murder based upon an aider and abetter theory unless the defendant killed, attempted to kill, or intended to kill the victim. 458 U.S. at 797, 102 S.Ct. at 3376, 73 L.Ed.2d at 1151. The Supreme Court held that because Enmund was a minor actor in an armed robbery, was not on the scene when the

killing occurred, never intended to kill, and had no culpable mental state, the death sentence was unwarranted. However, when a defendant's participation in a felony is major and is combined with reckless indifference to human life, the *Enmund* culpability requirement is satisfied. *Tison*, 481 U.S. at 158, 107 S.Ct. at 1688, 95 L.Ed.2d at 145.

Evidence exists in this case that Robinson loaded firearms into his vehicle in preparation for the trip from Banning to Yuma, that Washington was at least present when the hands and feet of Ralph and Sterleen Hill were bound, that the Hills were terrorized with firearms, that Robinson masterminded the trip, and that Washington was at least present in the Hills' home when Ralph Hill was wounded and Sterleen Hill was murdered. The requisite culpability was met as to both Robinson and Washington.

Robinson and Washington argue that a separate *Enmund/Tison* evidentiary hearing was required in order to determine the extent of the respective defendant's personal culpability for the slaying. We disagree. Previously, when this court has remanded matters to the trial court for such hearings, the principles articulated under *Enmund/Tison* were not in effect at the time that the aggravation-mitigation hearings were conducted, and therefore *Enmund/Tison* principles were not considered by the sentencing courts. *See, e.g., State v. Tison*, 160 Ariz. 501, 502, 774 P.2d 805, 806 (1989). In the matter before us, the trial court expressly addressed the *Enmund/Tison* factors. No separate hearing was required. In this case, the trial court found two aggravating circumstances

applied to Washington, and that three applied to Robinson. Based upon our independent review of the aggravating circumstances, we have concluded that two aggravating circumstances apply to Washington and Robinson. These two aggravating circumstances are sufficient to warrant imposition of the death penalty.

D. Proportionality Review

Finally, we must conduct a proportionality review to determine whether "the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *State v. Walton,* 159 Ariz. 571, 589, 769 P.2d 1017, 1035, *cert. granted,* 493 U.S. 808, 110 S.Ct. 49, 107 L.Ed.2d 18 (1989); *State v. Richmond (Richmond I),* 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976), *cert. denied,* 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1977).

In our proportionality review, we have considered cases involving the aggravating circumstances found in this case and cases where the trial court found no mitigating circumstances sufficiently substantial to require leniency. *See, e.g., State v. Walton, supra* (no mitigating circumstances shown; death penalty affirmed upon findings that killing was done for pecuniary gain and in a heinous, cruel, or depraved manner); *State v. Martinez-Villareal,* 145 Ariz. 441, 702 P.2d 670, *cert. denied,* 474 U.S. 975, 106 S.Ct. 339, 88 L.Ed.2d 324 (1985) (no mitigating circumstances found; death penalty affirmed upon findings that killings were done for pecuniary gain and in a

depraved manner); *State v. McCall, supra* (no mitigating circumstances found; death penalty affirmed upon findings that killings were done for pecuniary gain and in a heinous, cruel, or depraved manner); *State v. Gillies (Gillies I), supra* (despite defendant's youth, death penalty affirmed upon finding that the killing was done in a cruel manner); *State v. Ceja,* 126 Ariz. 35, 612 P.2d 491 (1980) (no mitigating circumstances shown; death penalty affirmed upon finding that killings were done in a heinous and depraved manner).

We also have considered cases in which the death penalty was reduced to life imprisonment. *See, e.g., State v. Stevens,* 158 Ariz. 595, 764 P.2d 724 (1988) (findings of defendant's diminished capacity to appreciate the wrongfulness of his conduct, lack of prior convictions, and non-aggressive nature outweighed finding that the killing was done for pecuniary gain); *State v. Johnson,* 147 Ariz. 395, 710 P.2d 1050 (1985) (death penalty improper where aggravating circumstances erroneously found); *State v. Valencia,* 132 Ariz. 248, 645 P.2d 239 (1982) (youthfulness of defendant was substantial mitigating factor); *State v. Madsen,* 125 Ariz. 346, 609 P.2d 1046, *cert. denied,* 449 U.S. 873, 101 S.Ct. 213, 66 L.Ed.2d 93 (1980) (death penalty reduced to life imprisonment where killing not done in a depraved manner or for pecuniary gain).

Based upon our review of these decisions, we find that the imposition of the death penalty in the present case is proportional to the sentences imposed in similar cases.

FUNDAMENTAL ERROR

[35] We have searched the record for fundamental error as required by A.R.S. § 13-4035, *Anders v. California,* 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and *State v. Leon,* 104 Ariz. 297, 451 P.2d 878 (1969). Other than that mentioned, we find no error.

The judgments of conviction and sentences are affirmed.

MOELLER, CORCORAN and FELDMAN, JJ., and EINO M. JACOBSON, Judge, Court of Appeals, concur.
GORDON, C.J., and CAMERON, J., did not participate in this decision; pursuant to Ariz. const. art. 6, 3, EINO M. JACOBSON, Judge, Court of Appeals, Division One, and JOHN M. ROLL, Judge, Court of Appeals, Division Two, were designated to sit in their stead.
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165 Ariz. 51, 796 P.2d 853